

September 27, 2021

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

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REPORT AND DECISION

SUBJECT: Department of Local Services file no. **ENFR200123**

MARK FREE AND CHARLENE HERMAN

Code Enforcement Appeal

Location: [REDACTED] Snoqualmie

Appellants: Mark Free and Charlene Herman
represented by **Eric Lansverk**
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King County: Department of Local Services
represented by **Holly Sawin**
Department of Local Services
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RECOMMENDATIONS/DECISION:

Department's Recommendation:

Deny appeal.

Examiner's Decision:

Deny appeal in part; grant in part.

After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, the Examiner enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT:

Background

1. Mark Free is the record owner of Parcel 262-408-9075, in the RA 2.5 zone of unincorporated King County, near Snoqualmie, Washington (Property). The site has no postal address and does not have an established primary use. Exhibit D1 – 001. Mr. Free also owns the adjacent property to the east on which his residence is located (Homesite). Both the Property and Homesite are located on the North Fork Snoqualmie River, a shoreline of the state.
2. Based on a complaint, Officer Holly Sawin conducted a site visit on March 5, 2020 from the right – of – way. She observed two structures on the Property, one of which appeared to be a storage shed and the other an office/studio. She also observed an area which appeared to have been cleared of vegetation and graded to bare dirt, as well as what appeared to be a new gravel driveway extending south of the storage shed and then east to the office/studio structure. Exhibit D1 – 001.
3. The Department of Local Services, Permitting Division (DLS) issued a Notice and Order on October 8, 2020 alleging 2 violations: (1) construction of (a) a studio/office and (b) a storage shed on a parcel without an established primary use, within setbacks, within a potential landslide hazard area, a seismic hazard area, a potential steep slope hazard and an aquatic area and/or their buffers and without required permits; and (2) clearing and grading within the same categories of environmentally critical areas and/or their buffers without required permits. Exhibit D2.
4. Mark Free and Charlene Harmon (“Appellants”) timely appealed the Notice and Order on October 21, 2020, contending that they had performed no construction or clearing or grading. Exhibit D3 – 001. However, they also inconsistently stated that, in 2019 they constructed the shed for storage of tools. Exhibit D3 – 005.
5. DLS subsequently determined that the office/studio is a legal nonconforming use and should be dismissed from this case. Exhibit D1 – 001. Therefore, alleged violation (1)(a) is dismissed and the Examiner does not further address it.

Environmentally Critical Areas and Shoreline Jurisdiction

6. King County iMap indicates that portions of the Property are encumbered by a potential steep slope hazard and a seismic hazard and the entire Property is within the shoreline jurisdiction (aquatic and conservancy shoreline designations). Exhibit D7 – 001 (potential steep slope hazard and seismic hazard); Exhibit D7 – 002 (shoreline).

7. Shorelines of the State are Type S streams, a category of aquatic areas. KCC 21A.06.072.C; 21A.24.455.A.1. Within the rural area, they require a 165-foot buffer and 15-foot building setback from the buffer. KCC 21A.24.358.C.1; 21A.24.200. The Property is approximately 100 feet deep on the west and 71 feet deep on the east and is, therefore, entirely within the required aquatic area buffer. Exhibit D7 – 004.
8. Ofc. Sawin testified at the hearing in this matter that the seismic area mapped on King County iMap is not relevant. Further, DLS presented no evidence of the presence of landslide hazard areas. The only evidence offered regarding alleged steep slope hazard areas is a print out from King County iMap indicating that there are *potential* steep slope hazard areas. Therefore, the Examiner does not further consider the allegations that Appellants constructed the shop and conducted clearing and grading within a seismic area, landslide hazard area, or steep slope hazard area.
9. Appellants did not contest the fact that the entire Property is located within an aquatic area buffer and within the conservancy shoreline of the North Fork of the Snoqualmie River.

Storage Shed

10. Appellants constructed a 120 square foot shed in 2019. Exhibit D3 – 005; A11 – 001; testimony of Mark Free. Prior to doing so, Mr. Free searched the King County website for regulations, learning that a building permit is not required for a structure of less than 200 square feet; a structure must be set back 10 feet from a road; and the critical areas regulations limit the size of a residential accessory structure in an aquatic area buffer to 150 square feet.¹ Regrettably, he did not discover that critical areas regulations do not allow a new detached residential accessory structure within the aquatic area buffer and limit nonresidential structures within an aquatic area buffer to nonresidential farm structures. KCC 21A.24.045.D.3. Appellants concede that the shed is not a nonresidential farm structure.
11. The crux of the matter is that KCC 21A.25.100.C.24 allows residential accessory structures of up to 150 square feet in the conservancy shoreline environment. However, that portion of the conservancy shoreline environment that is within 165 feet of the North Fork Snoqualmie River is also an aquatic area buffer. In the aquatic area buffer, residential accessory structures are not allowed. KCC 21A.24.045. Given this arguable conflict, Appellants contend that KCC 21A.25.100.C.24 prevails, pointing to Regulatory Review Committee determination RRC 1 – 9 – 2014, Exhibit A13, and KCC 21A.02.060.A, which provides that, in case of conflict, regulations that are specific to an individual land use supersede regulations of general application. Neither argument prevails.
12. First, Appellants do not address KCC 21A.24.020.D, which provides that:

¹ This limit is actually contained in the shoreline regulations, not the critical areas regulations. KCC 21A.25.100.C.24.

When any other chapter of the King County Code conflicts with this chapter or when the provisions of this chapter are in conflict, the provision that provides more protection to environmentally critical areas apply unless specifically provided otherwise in this chapter or unless the provision conflicts with federal or state laws or regulations.

Here, the KCC 21A.24.045 provides more protection than KCC 21A.25.100.C.24 and, thus, prevails.

13. Second, both KCC 21A.24.045 and KCC 21A.25.100.C.24 have provisions specific to residential accessory structures. Neither is a regulation of general application. Thus, KCC 21A.02.060.A does not resolve the question.
14. Third, the two provisions can be harmonized. New residential accessory structures are allowed under both if the structure is 180 feet from the ordinary high water mark (the 165-foot aquatic area buffer plus the 15-foot building setback).
15. RRC 1 – 9 – 2014 addresses two questions, one of which directly answers the question presented here and one of which does not.
16. The first question addresses whether a new accessory residential structure may be constructed within a critical area buffer if the total footprint of all new construction does not exceed 1,000 square feet. The RRC concluded that “construction of a new, detached residential accessory structure is not an allowed alteration under KCC 21A.24.045.” (Emphasis added). The RRC noted that KCC 21A.24.045 allows expansion of an existing residential or residential accessory structure by up to 1,000 square feet and discussed and then tabled the question of whether a similar allowance should be made for a detached residential structure. To date, the code has not been amended to allow a detached residential accessory structure within an aquatic area buffer.
17. The second question the RRC addressed was whether expansion of an existing residential accessory structure located within both an aquatic buffer and the shoreline jurisdiction is allowed if the total square footage of the existing structure and proposed expansion exceeds 150 square feet. Three code provisions were at issue: the two discussed in the immediately preceding paragraphs as well as KCC 21A.25.210, which expressly allows expansion of a residential accessory structure if allowed under the critical areas regulations (subject to conditions not relevant here). Thus, both the critical areas regulations and the shoreline regulations allow expansion of an existing residential accessory structure. Unfortunately for Appellants, however, neither allows a new residential accessory structure.
18. The RRC concluded that, prior to a code amendment resolving the conflict between KCC 21A.25.100.C.24 (limiting new structures to 150 square feet) and KCC 21A.25.100 (allowing up to 1,000 square feet expansion of existing structures), the 150 square foot limit in KCC 21A.25.100 would be applied only to new structures. Appellants rely on this conclusion, taken out of the context of the question posed, to argue that a new residential accessory structure may be constructed in an aquatic buffer so long as it does

not exceed 150 square feet. However, the RRC directly answered that question to the contrary in response to the first question presented.

Clearing and grading – Driveway and Lawn

19. KCC 21A.24.045.D.17 allows maintenance of a driveway within an aquatic buffer if the maintenance does not involve the use of herbicides, hazardous substances, sealants or other liquid oily substances in aquatic areas or their buffers.
20. KCC 21A.24.045.D.59 allows maintenance of lawn, landscaping or garden for personal consumption within existing landscaped areas or other previously disturbed areas located within aquatic areas and their buffers.
21. Similarly, KCC 16.82.051.C.13 exempts from the requirement for a clearing and grading permit both the maintenance of a driveway and maintenance of lawn, landscaping and gardening for personal consumption within an aquatic area buffer under certain conditions, the relevant ones requiring that the condition or site maintained was constructed or created in accordance with the law and that the maintenance does not expand the driveway, lawn, landscaping or other approved area being maintained. There is evidence in the record that the driveway and lawn historically existed. There is no evidence in the record demonstrating that either was not established legally or that the work Appellants undertook expanded either. The question with the grading code is then the same as with the critical areas code: whether the activities undertaken constitute permitted maintenance.
22. KCC 21A.06.731 defines maintenance as:

[T]he usual acts to prevent a decline, lapse or cessation from a lawfully established condition without any expansion of or significant change from that originally established condition. Activities within landscaped areas within areas subject to native vegetation retention requirements may be considered “maintenance” only if they maintain or enhance the canopy and understory cover. “Maintenance” includes repair work but does not include replacement work. ... (emphasis added).
23. The grading code does not define maintenance. In light of the fact that both the critical areas and the grading exemption applied to the same activity – maintenance of lawn, landscaping and gardening for personal consumption – the Examiner will apply the KCC 21A.06.731 definition of maintenance to both codes.
24. In 2019, Appellants imported gravel for a driveway to the studio. Mr. Free contends that he simply “refreshed” an existing driveway.
25. The studio served by the driveway has existed for many decades, possibly to the 1960s. Exhibit D9. It is reasonable to assume that it was served by some sort of a driveway.
26. Mr. Free testified that he moved onto the adjacent parcel, 44911 SE 70th Street, in 1993 and that, at that time there was a driveway on the Property leading to the studio. *See also*

Exhibit A1. Due to the significant local rainfall, grass grows through the gravel frequently. Appellants did not wish to apply herbicides to control grass growth. Consequently, in the intervening years Appellants “refreshed” the driveway with washed gravel chips every two to three years. Testimony of Mark Free.

27. Mr. Free’s testimony is credible. Exhibit A5 – 001 is a 2008 Google Street Map showing the driveway with grass and moss growing through the gravel chips. Exhibit A6 is a 2019 photograph showing the driveway with a lesser extent of grass coming up through the chips. One may reasonably conclude that, in the intervening years, the driveway had been “refreshed” and would soon be in need of additional “refreshing.”
28. In 2019 Mr. Free also spread river silt/sand approximately two inches deep across the area DLS contends Appellants graded to bare dirt. Testimony of Mark Free. The Property area where the silt/sand was deposited and spread is shown on exhibits D5 – 002 and D5 – 003. The silt/sand had been deposited by a flood of the North Fork Snoqualmie River on the entrance road to the neighborhood. Exhibit A9; testimony of Mark Free.
29. Mr. Free also testified that when he moved onto the adjacent property in 1993, an area of the subject Property was lawn and that he has maintained it as a lawn/landscaped area. Testimony of Mark Free; Exhibit A1. Mr. Free believed that the silt/sand would provide nutrients to encourage grass growth in the lawn area where moss was beginning to dominate. Exhibit A8 is a recent photograph showing grass growing on the area where Appellant’s spread the river silt/sand.
30. While Ofc. Sawin’s observations reasonably led her to believe that grading had occurred, the Examiner finds that the work Appellants conducted falls within the definition of maintenance. It was, in essence, no different than fertilizing an existing lawn and likely had lesser impact than commercial fertilizers.
31. Any Finding of Fact which should more appropriately be considered a Conclusion of Law is adopted as a Conclusion of Law.

CONCLUSIONS OF LAW

1. Any Conclusion of Law which should more appropriately be considered a Finding of Fact is adopted as a Finding of Fact.
2. DLS has the burden of proving the alleged violations by a preponderance of the evidence. KCC 20.22.210.B; Rules XV.E.1 and XV.E.1 of the Hearing Examiner’s Rules of Procedure and Mediation.
3. DLS has not shown by a preponderance of the evidence that Appellants conducted clearing and/or grading in environmentally critical areas without required permits. The work by Appellants constitutes permitted maintenance.

4. DLS has shown by a preponderance of the evidence that Appellants constructed the shop in an aquatic area buffer without the required permits. It has not shown that the shop was constructed within a landslide, steep slope or seismic hazard area.
5. A new residential accessory structure located in the aquatic area buffer and in the shoreline conservancy environment must comply with both the critical areas regulations and the shoreline regulations. KCC 21A.24.045 does not allow a new detached residential structure in an aquatic area buffer. The Examiner recognizes that her interpretation of the Code would not allow Appellants to obtain a permit for the shed in its current location even if the Property were combined with the Homesite. It may be worth exploring whether it could be relocated so that it is attached to either the studio or the residence.

DECISION:

1. The appeal is **GRANTED** as to alleged Violation 2, clearing and grading and as to Violation 1(a) construction of a studio/office. The appeal is **DENIED** as to alleged Violation in 1(b), construction of a storage shed on a parcel without an established primary use and within an aquatic area buffer, without the required permits.
3. Apply for and obtained the required permits and inspections and approvals for the storage shed with complete application to be submitted by the following schedule:
 - A. By **October 27, 2021**, Appellants shall submit either:
 - i. A complete permit pre-screening meeting packet for the storage shed (such as to move it and attach it to the home or studio); or
 - ii. Apply for a permit to demolish the storage shed.
 - B. Thereafter Appellants shall either:
 - i. Submit a complete building permit application within **60 days** of the prescreening meeting and thereafter follow all requirements. (Application for permit does not ensure that a permit will be issued. An applicant should also be aware that permit fees and/or site conditions and/or repair expenses may make the application cost prohibitive. Structures are typically not allowed in setbacks and critical areas or their buffers. The only alternative may be to demolish the non-permitted construction.)
 - C. Meet all deadlines for requested information associated with the permit and pick up the permit within the required deadlines. Request building inspection (if applicable) within 15 days of building permit issuance, make any required corrections and obtain final approval within set timeframes, or by any reasonable deadline extension DLS provides.

4. No penalties shall be assessed against Mark Free and Charlene Herman or the subject Property if the above deadlines, and any reasonable extensions to those deadlines DLS authorizes, are met. If not, DLS may issue penalties retroactive to today.

ORDERED September 27, 2021.

Alison Moss
King County Hearing Examiner *pro tem*

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 SEPTEMBER 21, 2021, HEARING IN THE APPEAL OF MARK FREE AND CHARLENE HERMAN, DEPARTMENT OF LOCAL SERVICE FILE NO. ENFR200123

Alison Moss was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin, Eric Lansverk, and Mark Free. 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 October 8, 2020
Exhibit no. D3	Appeal, received October 21, 2020
Exhibit no. D4	Codes cited in the notice and order
Exhibit no. D5	Photographs of subject property, dated March 5 and November 25, 2020
Exhibit no. D6	King County Assessors Records
Exhibit no. D7	iMap Critical Area Overlays
Exhibit no. D8	Google Street View of Subject property, dated August 2008
Exhibit no. D9	Testimony of Mr. Bryan Stokosa, dated January 25, 2021
Exhibit no. D10	Sensitive Areas Notice on Title #2004062900116 for parcel 262408-9078
Exhibit no. D11	Aerial photographs of subject property, dated 2015, 2019, and 2021

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

Exhibit no. A1	Aerial arrangement of structure and landscaped space when moved to property in 1993
Exhibit no. A2	Aerial arrangement of structure and landscaped space after 2019
Exhibit no. A3	Map from King County
Exhibit no. A4	Statutory Warranty Deed
Exhibit no. A5	2008 Google Street Map Capture showing the existing driveway to the Riverside Studio/Office with grass & moss growing through and on the rock chips
Exhibit no. A6	Photo from Summer of 2019 showing the overgrown rock chip driveway to the Riverside Studio/Office
Exhibit no. A7	Photo of the current roadside structure viewed from the road
Exhibit no. A8	Current landscaped Space No. 2 viewed from the road
Exhibit no. A9	August 27, 2021 Letter from Bryan Stokosa
Exhibit no. A10	December 8, 2020 Letter from Bud Jacque
Exhibit no. A11	Appeal Issue A - Shed
Exhibit no. A12	Appeal Issue B - Driveway/Lawn
Exhibit no. A13	January 9, 2014 Regulatory Committee Minutes
Exhibit no. A14	February 8, 2021 Email between Holly Sawin and Laura Casey
Exhibit no. A15	September 11, 2021 letter from Bryan Stokosa
Exhibit no. A16	King County Code Sections Cited

AM/lo

September 27, 2021

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR200123**

MARK FREE AND CHARLENE HERMAN
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 September 27, 2021.



Lauren Olson
Legislative Secretary

Breazeal, Jeri

Department of Local Services

Charlene Herman, Mark Free

Hardcopy

Lansverk, Eric

Hillis Clark Martin & Peterson P.S.

Hardcopy

Lux, Sheryl

Department of Local Services

Sawin, Holly

Department of Local Services

Smith, Michelle

Hillis Clark Martin & Peterson P.S.