August 13, 2021

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. **ENFR210205 (SWO) (NOV)**

RACHNA AND STEPHAN GRUNKEMEIER
Code Enforcement Appeal

Location: [redacted] Woodinville

Appellants: Rachna and Stephan Grunkemeier
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FINDINGS AND CONCLUSIONS:

Overview

1. Rachna and Stephan Grunkemeier (Appellants) challenge a Department of Local Services (Local Services) enforcement order related to an accessory structure, clearing, grading, and occupancy of a recreational vehicle. 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 grant the appeal as to the RV and grading, deny it as to the accessory structure, and partially deny it as to clearing.

Background

2. In March, Local Services served a stop work order for Appellants placing or constructing a structure, along with clearing and grading, all without permits. Ex. D2. In April, Local Services followed this up with a notice and order asserting violations related to Appellants constructing an accessory dwelling unit (ADU), clearing and grading over the thresholds allowed without obtaining a permit, and occupancy of a recreational vehicle (RV). Ex. D4. Appellants timely appealed both those. Exs. D3 & D5.

3. We went to hearing on July 22. Relevant testimony and exhibits are discussed below.

Analysis

Recreational Vehicle

4. Local Services agreed the RV is no longer occupied and thus is in compliance.

Accessory Structure

5. The subject property is too small to legally support a detached ADU under the current zoning rules.[1] (It may also be too small to have a second on-site septic system, but that is a different question for a different agency and different review tribunal.) Appellants assert that they have a legal nonconforming use to an ADU. The structure that was there when Appellants purchased it is best depicted in exhibit D11b at 005 (2019).

6. The bedrocke requirement for a legal nonconforming use is the owner showing that the use was lawfully created, and then only later became illegal under some contrary zoning ordinance. *King County, Dept. of Dev. & Envtl. Services v. King County*, 177 Wn.2d 636, 643, 305 P.3d 240 (2013). A use must have been lawfully established in order to later obtain legal nonconforming use status. KCC 21A.32.040 ("Any use, structure or other site improvement not established in compliance with use and development standards in effect at the time of establishment shall be deemed illegal and shall be discontinued or terminated…."). No office or living space—and certainly no ADU—was ever legally created on the site. And at well over 200 ft.^{2}, even just constructed as a storage shed in 1994 (the best estimate for when the outbuilding was added), it would have required a permit. There is nothing legal about the current set up.

7. Instead, the ability to legalize an ADU turns on KCC 23.36.030.B, which states that where:

> an owner of property where a violation has occurred has affirmatively demonstrated that the violation was caused by another person or entity

[1] The property is under an acre, while the minimum lot size required for a detached ADU is 3.75 acres.

> 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.

8. Appellants assert there is clear and convincing evidence that the building was marketed as an accessory dwelling unit. That is not what the record shows. Instead, it was pitched as, "There is an additional separate cottage *building* which was *framed as an office* with a kitchen, bathroom and[] living spaces." Ex. A1 (italics added). The listing itself was even more circumspect, promising only,, "Additional separate building *framed as an office* with kit[chen]/ba[th]—needs work." Ex. D7b (italics added). Even to an unsophisticated purchaser—and Appellant is a real estate agent—that should have been a flashing yellow light that if it was being used as an ADU, it may have been bootlegged in.

9. We have not viewed that type of knowledge as absolutely eliminatory, however. Instead, we have read the "without the property owner's knowledge or consent" as more about the action when undertaken, reading our language consistently with the similar provision that applies directly to Local Services, namely that 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).

10. Thus, KCC 23.36.030.B (and KCC 23.02.130.B) bar relief in the scenario where, say, owners hire a tree cutting service and then claim innocent-owner protection because they did not know such clearing required a permit. Conversely, we have not read KCC 23.36.030.B as requiring due diligence.[2] Yet here we do not face a scenario where the listing promised something like, "Separate dwelling unit with a kitchen, bathroom and living space," and then it turned out, surprisingly, that what was there was illegal. The idea that Appellant, a real estate agent, had "no idea" the ADU was not legally permitted is difficult to fathom, given how carefully the listing agent worded the description to avoid overpromising.

11. Appellants are correct that the insurer believed there was an additional residential structure, but what evidence that opinion was based on is not so clear. And, of course, ADUs are only one type of residential structure. Appellants point to a second electrical meter as proof of an ADU, but the second electrical box showed it was for *commercial*, not residential use—a use consistent with the seller's listing of an accessory building "framed as an office." Exs. A7; A1; D7b. A second septic system may mean something,

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[2] Local Services' citation to KCC 19A.04.190 is unavailing. Title 19A covers land segregation, and KCC 19A.04.190 deals with a lack of knowledge that the *lot itself* was created illegally. That section is irrelevant to a Title 23 analysis—which turns on KCC 23.36.030.B, read alongside KCC 23.02.130.B—unless the issue involves the legality of parcel itself. Here the issue is an illegal structure built on a legally-created lot.

exhibit A2, but that does not necessarily correlate with a legal ADU. (The septic was apparently bootlegged in, as Public Health's records show the septic system was only approved to serve the main house. Ex. D9.) The Assessor's records—easily searchable online in a matter of minutes—shows the structure as a "shed/workshop." Ex. D11a at 002. And Appellants did not submit a single picture of what the inside of the building looked like when they purchased it, nor what it looked like as they were transforming it, or even after they transformed it.

12. We do not find that Appellants qualify as nonculpable owners.

13. Even if we are misreading the above evidence, and they in fact do, we still do not find relief warranted. Appellants' case for what amounts to equitable relief fails on several levels:

- Appellants did not simply make "repairs to the structure" or "undert[ake] repair," as they represented in their appeal statements. Ex. D3 at 002, D5 at 001. To "repair" is to restore or to mend.[3] If they had fixed the roof, that would have been a repair. Instead, they *expanded* the structure from somewhere in the vicinity of 525 ft.^{2} to 768 ft.^{2} It was an expansion they did not mention in their pre-hearing materials. Instead, the expansion came out at hearing only when Local Services put on its case.

- Not only did Appellants just expand it—say adding a few square feet to the remaining structure—they took down all four walls and added a new roof. That is constructing a completely new building on an existing foundation, not making "repairs" to a pre-existing building.[4] *Compare* Ex. D11b at 005 (2019) *with* Ex. D8. And it was new construction they undertook without first applying for the necessary permits.

- Appellants did not just expand the building square footage by the 10% that could conceivably be allowable for a legally non-conforming use—and again, there was not a legally non-conforming ADU of any size on the property—they expanded it by 46%. KCC 21A.32.065.A.1.a.

- Appellants did not just expand it by 46%, they argue that such limits do not even constrain them, and they can expand the ADU to up to 1000 ft.^{2}[5]

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[3] https://www.dictionary.com/browse/repair.

[4] It brings to mind the old sawing about the man who proclaims that his grandfather had bequeathed him Abraham Lincoln's axe, except that his great-great grandfather had replaced the handle and his great grandfather had replaced the head.

[5] The 10% lifetime expansion limit would constrain them even if an ADU had been legally established. Expanding the size of (hypothetically legal) nonconforming ADU expands the existing nonconformance. That is a no-no under KCC 21A.32.055.A, unless it meets KCC 21A.32.065.A.1.a's potential 10% allowance. We do not read the County code like Seattle's; Seattle has codified greater distinctions between nonconforming uses and nonconforming structures associated with those uses than King County has. *Cf. Total Outdoor Corp. v. City of Seattle Dept. of Planning and Development*, 187 Wn. App. 337, 339, 356, 348 P.3d 766 (2015).

14. Today's scenario is dramatically different from any scenario where we have found an appellant to be a non-culpable owner and then used our KCC 23.02.130.B authority to waive strict compliance. It is unlike:

- *Larson*,[6] where the property owner purchased a property with a second home so well-established that when she applied for a permit to attach a garage to that, the permitting department approved the attached garage without even questioning whether the home itself was legal. Only years later was it discovered that the home itself had never been permitted. Here, there were serious warning signs at the point of purchase.

- *Mulvihill*,[7] where the current property owner had already agreed to cut back some of the previous owner's illegal improvements, and just wanted to keep an oversized (pre-existing) gazebo he could not feasibly pare down to meet the dimension limits. Here, Appellants took it upon themselves to *expand* the structure.

- *Skirvin*,[8] where a terminally ill appellant on palliative care simply wanted to legalize a garage, a garage a previous owner had constructed, improvidently, over a drainfield. We found that he had "no inkling" the garage was problematic at the time of purchase, and the appellant had not modified the garage since purchase. Here, there was more than an inkling of trouble, and Appellants constructed a much larger building on the original building's foundation.

- *Morrison*,[9] where Local Services only discovered the pre-existing barn because the new owners proactively started the permit process for a *future* project. In undertaking permit review, a Local Services employee discovered that a previous owner had built the barn into a critical area buffer. Local Services then asserted that the barn could not retroactively be permitted and would need to be destroyed or taken up and moved. Here, Appellants began a complete rebuild with a substantial expansion, only to begin the permitting process after they were caught in the act.

15. KCC 23.36.030.B grants an extraordinary power to an examiner to essentially override the normal permitting requirements assigned to other entities.[10] Where we enter an order that allows something which could not otherwise be permitted to actually be permitted, we are, by fiat, essentially creating a legal nonconforming use. Our Court instructs us that, "Nonconforming uses are disfavored," and the Court has "repeatedly held that the

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[6] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2014/ENFR120330_Larson.ashx?la=en.

[7] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2015/E0800382_Mulvihill.ashx?la=en.

[8] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2017/2017%20august/E0700414_Skirvin_OrderOnSubmittingAddtlDocumentsForTheRecord.ashx?la=en

[9] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2019/2019%20ALL/ENFR180998_Morrison_updated.ashx?la=en.

[10] For a building permit, review is first via Local Services, and then, if a dispute arises, via an appeal to superior court. It does not come through the examiner.

doctrine is a narrow exception." *King County, Dept. of Dev. & Envtl. Services v. King County*, 177 Wn.2d 636, 646, 305 P.3d 240 (2013).

16. Given the facts of this case, we do not find that our taking an extraordinary step to call something illegal legal is necessary to avoid an injustice. And our facts come nowhere near meeting the actual standard, which authorizes us to intervene only to avoid doing a *substantial* injustice. We find no injustice, let alone a substantial injustice, by allowing the normal permitting process to run its course.[11] We will not intervene in that process as it relates to the building (although we do weigh in, below, on the clearing).

Clearing

17. Unlike adding impervious surface (discussed below), where there is typically a post-2005 allowance for additional activity regardless of what was there previously, there is generally no wiggle room for additional clearing on a lot that already has 7000 ft.^{2} of clearing.[12] Most sites with a pre-existing home will typically have over 7000 ft.^{2} of "cleared" space, meaning there is no general allowance for *any* additional clearing without a permit.[13] We have criticized that system and for years have pushed for legislative change.[14] That has not happened, and so we are stuck with the code as it remains today.

18. Normally, appeals reaching us involve the scenario where the current owner has cleared over 7000 ft.^{2} by themselves, mooting our above concerns. But here, Local Services points to 6059 ft.^{2} of clearing post-April 2019. Ex. D14. Some of that clearing related to the septic system, which is exempt. Ex. A12; KCC 16.82.150.A.1.b. And Appellants purchased the property in October 2020, meaning some clearing was not on their watch. Moreover, Appellants have shown that a portion of the clearing undertaken during their ownership was a neighbor encroaching onto what they would later learn was their land. Exs. A3, A22, A37.

19. Appellants and Local Services have apparently come to an understanding of the scope of clearing review; we do not want to disturb that. And Local Services noted that the clearing review would be "minimal" and wrapped into the building permit review. We hold Local Services to that because, while the current code is fairly draconian for properties already exceeding 7000 ft.^{2} of clearing, this is not a scenario where Appellants undertook significant clearing.[15]

[11] Local Services thinks the structure can be permitted as accessory living space, a workshop, office, or some other use. Ex. D1 at 003.

[12] Local Services stated that 2000 was the baseline for measuring clearing. The year 2000 is not mentioned anywhere in KCC chapter 16.82. We are unaware of any obvious baseline date from which to measure "cumulative" clearing.

[13] There are discrete exceptions, for things like noxious weeds, hazardous trees, or clearing for septic systems.

[14] Most recently, https://kingcounty.gov/~/media/independent/hearing-examiner/documents/annual-reports/2020-annual-report.ashx?la=en at 19-21.

[15] That does not prevent Local Services from pursuing compliance with the neighbor for the clearing the neighbor performed.

Grading

20. Unlike clearing, grading typically has an allowance of 2000 $ft.^2$ of new impervious surface added since 2005.

21. Impervious surface is not a binary, on/off switch. Impervious surfaces include any area that "prevents or retards the entry of water into the soil mantle as under natural conditions before development or that causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions before development." KCC 9.04.020.Z. But new impervious surfaces not only cover that initial "creation of impervious surface," they also include "the addition of a more compacted surface." So, for example, even if an area once-graveled could still be considered somewhat "impervious" decades later, in the sense that the remaining gravel may slightly retard the entry of water into the soil as compared to an adjacent area that never had gravel, if water begins infiltrating in such sufficient quantities that the area sprouts abundant vegetation, new work may count as creating new impervious surface.

22. Local Services asserts that Appellants added 1090 $ft.^2$ of impervious surface in the graveled parking area behind the main house. Ex. D15a. Some grass appears to be growing through along the edges in the "before" condition. Appellants may have added "a more compacted surface" along the periphery, but asserting that Appellants added over 1000 $ft.^2$ in this area overstates the extent of new impervious surface.

23. Local Services asserts that Appellants added 1575 $ft.^2$ along the border with their neighbor. Ex. D15a. Certainly, the neighbor encroached on the property and created some new impervious surface, especially with asphalt (a more compacted surface than gravel), and the neighbor freely admitted to adding a "huge amount of fill" along the border.[16] Ex. A10, A37. And Appellants freshly graveled an area for an RV. Exs. D16, A19. However, the area by the road was a somewhat maintained gravel driveway in the "before" scenario. And that driveway may have even extended back under the tree canopy. Exs. A24-A27, A35.

24. Local Services asserts that Appellants added 1343 $ft.^2$ of impervious surface along the public road. Ex. 15b. However, there is a distinct, pre-existing gravel driveway there. On first blush it appears they widened the impervious surface, with vegetation on the "before" picture and an expanded bare patch on the "after." However, looking more closely, we discern a distinct color line between the gray graveled area and the brownish, topsoil-looking area nearer the fence. Appellants *cleared* the area nearer the fence of the vegetation that had been there, but clearing is separated and addressed above. Appellants may have slightly widened that impervious area, but by nowhere close to the asserted 1343 $ft.^2$

25. Moreover, since Appellants' purchased the lot, a pool, a shed, a stone tile patio, and some boats have been removed, making additional areas less impervious than they were before. Exs. A18, A23, A25, A34.

[16] Again, nothing we say here prevents Local Services from holding the neighbor accountable through Local Services' separate, pending code enforcement action. Ex. A33.

26. In sum, Local Services has not shown a net increase of at least 2000 ft.² of new impervious surface (even in the broad sense that "new impervious surface" conveys) added since 2005. Appellants will want to ensure that their building permit application carefully demarks gravel and other areas so there is no confusion going forward, but there is no grading violation.

DECISION:

1. We grant the appeal as to the RV.

2. We deny the appeal as to the accessory structure. Appellants shall submit a complete building permit application by **December 12, 2021**. Thereafter, Appellants shall diligently follow through with the permit process until it is completed.

3. We deny the appeal as to clearing, in that there was some non-exempt clearing on a property already over the clearing limit, but we find Appellants clearing fairly limited. Appellants shall address this in their building permit application.

4. We grant the appeal as to grading. Appellants shall address impervious surfaces in their building permit application, but there is no separate grading violation.

5. No penalties shall be assessed against Appellants or the subject property if the above actions are completed by the deadline, or by any reasonable deadline extension DLS provides. If not, Local Services may issue penalties retroactive to today.

ORDERED August 13, 2021.

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 JULY 22, 2021, HEARING IN THE APPEAL OF RACHNA AND STEPHAN GRUNKEMEIER, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR210205 (SWO) (NOV)

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin, Sheryl Lux, Dean Williams, and Rachna Grunkemeier. 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	Stop Work and Appeal Form, posted March 25, 2021
Exhibit no. D3	Stop Work Appeal, received via email April 16, 2021
Exhibit no. D4	Notice and order, issued April 26, 2021
Exhibit no. D5	Notice and Order Appeal, received via email May 12, 2021
Exhibit no. D6	Codes cited in the notice and order
Exhibit no. D7	Real Estate Listing for Subject Property
Exhibit no. D8	Photographs of new ABC structure taken by H. Sawin, dated March 25, 2021
Exhibit no. D9	KC Health On-site sewage disposal system subject parcel, dated October 10, 1994
Exhibit no. D10	Operation/Performance Monitoring Report, dated August 25, 2020
Exhibit no. D11	KC Dept. of Assessments iMap of property, June 28, 2021 & KC Dept. of Assessment RealProperty record, June 23, 2021
Exhibit no. D12	ConnectExplorer, April 12, 2021 & August 20, 2019
Exhibit no. D13	ConnectExplorer, April 22, 2019 & April 12, 2021
Exhibit no. D14	ConnectExplorer, May 1, 2020 & April 12, 2021
Exhibit no. D15	ConnectExplorer, May 24-25, 2009 & April 12, 2021
Exhibit no. D16	Photograph taken by H. Sawin, dated March 25, 2021
Exhibit no. D17	ConnectExplorer screenshot, Sheryl Lux measurement of ABC structure
Exhibit no. D18	ConnectExplorer screenshot, Sheryl Lux measurement of impervious surface
Exhibit no. D19	ConnectExplorer screenshot, Sheryl Lux measurement of impervious surface
Exhibit no. D20	ConnectExplorer screenshot, Sheryl Lux measurement of impervious surface
Exhibit no. D21	ConnectExplorer screenshot, Sheryl Lux measurement of impervious surface
Exhibit no. D22	ConnectExplorer screenshot
Exhibit no. D23	Email chain between Sheryl Luc and Grunkemeiers

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

Exhibit no. A1	Listing Description
Exhibit no. A2	Septic Inspection Report
Exhibit no. A3	Neighbor Clearing 10-1-2020

Exhibit no. A4	iMap 2015
Exhibit no. A5	Neighbor Clearing Aerial
Exhibit no. A6	Additional Listing
Exhibit no. A7	Electrical Meters
Exhibit no. A8	ADU Depiction
Exhibit no. A9	Title Insurance
Exhibit no. A10	Neighbor Admission
Exhibit no. A11	Form 17
Exhibit no. A12	Clearing Depiction
Exhibit no. A13	View to East
Exhibit no. A14	View North Over Septic
Exhibit no. A15	View West
Exhibit no. A16	Photo Angles Depiction
Exhibit no. A17	2008 East Driveway
Exhibit no. A18	Existing Patio as Sold
Exhibit no. A19	RV No Connections
Exhibit no. A20	Evidence of Windstorm
Exhibit no. A21	Evidence of Windstorm 2
Exhibit no. A22	Car Lot Clearing 2020
Exhibit no. A23	2019 2021 Comparison
Exhibit no. A24	2017 Extent of 2nd Driveway
Exhibit no. A25	2019 Extent of 2nd Driveway
Exhibit no. A26	Extent of 2nd Driveway Street View
Exhibit no. A27	2011 South Area
Exhibit no. A28	2015 South Area
Exhibit no. A29	Poured Concrete Foundation
Exhibit no. A30	Poured Concrete Foundation 2
Exhibit no. A31	iMap 2007 w Depiction
Exhibit no. A32	18660 ENFR18-0871
Exhibit no. A33	18660 ENFR20-0721
Exhibit no. A34	2019 to 2021
Exhibit no. A35	2015 Street view
Exhibit no. A36	2018 Street view
Exhibit no. A37	2021 Street view
Exhibit no. A38	2021 Aerials

DS/lo

August 13, 2021

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR210205 (SWO) (NOV)**

RACHNA AND STEPHAN GRUNKEMEIER
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 August 13, 2021.

Lauren Olson
Legislative Secretary

Breazeal, Jeri
Department of Local Services

Grunkemeier, Rachna/Stephan
Hardcopy

Lux, Sheryl
Department of Local Services

Moffet, Bill
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Sawin, Holly
Department of Local Services

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