

September 13, 2022

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

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

REPORT AND DECISION

SUBJECT: Department of Local Services file no. **ENFR200688**

JAMES AND KIM MAGNUSON
Code Enforcement Appeal

Location: [REDACTED] Renton

Appellants: **James and Kim Magnuson**
[REDACTED]
Renton, WA 98056
Telephone: [REDACTED]
Email: [REDACTED]

King County: Department of Local Services
represented by **Jeri Breazeal**
Department of Local Services
35030 SE Douglas Street Suite 210
Snoqualmie, WA 98065
Telephone: (206) 477-0294
Email: jeri.breazeal@kingcounty.gov

FINDINGS AND CONCLUSIONS:

Overview

1. James and Kim Magnuson appeal a notice and order related to clearing and grading and construction of a tiny house. After hearing witness testimony and observing demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments (including Mr. Magnuson's post-hearing assertions) and the relevant law, we deny his appeal, but we extend the compliance deadlines and simplify what Mr. Magnuson needs to submit along with a permit application to restore the cleared and graded area.

Background

2. After receiving a complaint, Local Services' Jeri Breazeal visited the subject property in August 2020. Testimony; Ex. 1 at 001. From the vantage point of the right-of-way, she documented some new driveway surfacing and some clearing. Ex. D13.
3. Ms. Breazeal issued a stop work order finding clearing/grading without permits within aquatic buffer and shoreline areas and requiring, as corrective work, obtaining permits and placing erosion and sediment control. Ex. D5 at 001. That order noted that Local Services had to receive an appeal by the end of August, or the order would become a final determination that the conditions described in the order existed and constituted a code violation and that work was properly ordered to cease. Ex. D5 at 003. Mr. Magnuson did not appeal.
4. Mr. Magnuson started the permit process, PREA20-0226. As part of that review, a Local Services ecologist wrote internally that the parcel is almost entirely constrained by critical areas and is within a Conservancy Shoreline environment. A previous owner had started the permit process and then bailed. The Assessor lists the parcel as unbuildable, which would explain why waterfront property was available to the Magnusons for \$25,000. Ex. D6 at 007. After a January 2021 preapplication meeting Local Services sent out information (including the above letter) on next steps. Ex. D6.
5. Local Services received an additional public complaint in September, with an attached picture showing construction on the property, with a follow-up picture in October. Ex. D14 at 001-02. In response to the complaint, Ms. Breazeal revisited the site. From the right-of-way she took pictures showing a newly-installed unit. Ex. D13 at 001-06. Ms. Breazeal sent Mr. Magnuson a letter discussing the as-then uncorrected violation (the clearing/grading) and the new construction. Ex. D7.
6. Mr. Magnuson responded four weeks later, noting that he had started the permit process through the state's Department of Labor & Industries (L&I) for a tiny house, a project he had begun constructing at his home, before towing it to the subject property. Ex. D8 at 001. That same day Ms. Breazeal emailed next steps and permit-related information. Ex. D8.
7. Ms. Breazeal visited the site in January 2022. Ex. D13 at 007. Local Services received an additional public complaint, with an attached picture, in April 2022. Ex. D14 at 003. Later that month, Local Services issued a notice and order, relisting (1) the clearing-grading-environmentally critical areas violation and adding (2) construction of a residence, also within environmentally critical areas, and also without the required permits, inspections, and approval. Ex. D2, D7 at 001, Ex. D1 at 001. Mr. Magnuson timely appealed, keeping the construction-related item simply an allegation and not a fixed fact.
8. We went to hearing on June 29.

9. Ms. Breazeal explained the difference between the role of Local Services versus L&I in permitting, what category (RV, tiny home, or something else) the construction might qualify under, and that an RV or something could be brought to the property for up to 60 days a year and still be considered passive recreation. Mr. Magnuson could propose a building pad as part of his clearing and grading permit application. She has open enforcement cases on five properties on Mr. Magnuson's street, including one of the properties Mr. Magnuson submitted photos of. She noted that Mr. Magnuson would not need a critical areas designation or a Geotech if he simply wanted to remove the added recycled asphalt and replant the disturbed area.
10. Mr. Magnuson explained that he added approximately two yards of recycled asphalt at the top of the pre-existing entrance outside the right-of-way, and he did not make any cuts or blade anything. *See also* Exs. A1-A5, A10, A25. He added nothing (such as recycled asphalt) in the trailer pad area. As to the tiny house itself, he noted that the road was so steep one could not bring an RV up and down. He showed nearby properties with motorhomes stored year-round and other structures and work. Exs. A17-A20, A21-A23, A28-A41. Vegetation is regrowing on his property. Exs. A13, A14, A26.
11. Ms. Magnuson explained that two trees had fallen down on the property and another one is on its way down, but that they had not felled any trees themselves.
12. At the end of the hearing, Mr. Magnuson explained that he would remove the tiny house, and we kept the record open for Ms. Breazeal to get a revised fee estimate for what would essentially be a restoration permit and for Mr. Magnuson to decide whether to apply for a restoration permit, or to sell the property and have the next owner handle the restoration. Post-hearing, after receiving a revised fee estimate, Mr. Magnuson responded that he would proceed with the clearing/grading permit but, as to the tiny house, asserted that the photos were taken by a trespasser, that it is against the law to use illegally-obtained photos, and that we should dismiss the tiny home violation. Ex. D15 at 003, 002.

Analysis

Clearing and Grading

13. As noted in the stop work order itself, the clearing and grading/critical area violation became final after the appeal deadline passed in August 2020. *See* KCC 23.28.020.D.¹ However, the *scope and extent* of the clearing/grading is fair game in the current appeal.
14. We found Mr. Magnuson credible. We accept that the only grading Mr. Magnuson did was adding recycled asphalt on the entranceway, and that he did no blading or excavating. (Ms. Breazeal did not counter this.) While his estimates of the area he cleared varied, from 20' x 30' in exhibit A7, to 20' x 40' at one point in the hearing, to approximately 20' x 60' later in the hearing, it was a fairly limited area. And there is no

¹ We do note, if it helps Mr. Magnuson sleep any better, that the type, amount, and execution of clearing/grading one can do in a critical area or its buffer without a permit is severely limited. It would have been a really hard row for him to hoe, even if he had timely appealed the stop work order, to show that even his limited work did not require a permit.

evidence of clearing below the building pad area, which is well up from the lake. Ex. A24, A26, A30. When Mr. Magnuson submits an application, he can clarify precisely what was cleared and where and how he plans to address that.

Structure: Admissibility

15. Pursuant to the exclusionary rule, the Fourth Amendment of the U.S. Constitution and Article I, section 7, of the Washington State Constitution requires the exclusion of evidence obtained by an unlawful search conducted by a governmental actor. However, these constitutional guaranties against unreasonable searches and seizures protect only against governmental actions; the application of the exclusionary rule does not extend to evidence obtained by a private person acting on their own initiative. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *State v. Ludvik*, 40 Wn. App. 257, 262, 698 P.2d 1064, (1985).
16. Evidence seized by a private person’s unlawful search should not be excluded unless it is shown that the government in some way instigated, encouraged, counseled, directed, or controlled the conduct of the private person, and therefore the private person was acting essentially as the government’s agent. *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985). Importantly, even if the private person’s motive was to aid the government, the private person’s motive alone is insufficient to transform an otherwise private search into a government search, so long as the private person is acting on their own initiative and not as the government’s agent. *State v. Sweet*, 23 Wn. App. 97, 100, 596 P.2d 1080 (1979).
17. If Mr. Magnuson had raised this issue before or at the hearing, we could have probed it, but in the thousand-plus code enforcement cases we have reviewed as a third-party neutral, a complainant acting as a government agent would be an extreme anomaly. Here there is no evidence that the complainant was essentially acting as government agent, and therefore the evidence obtained by the private person is admissible. Ex. D14. (We also note that only one of the three complainant-submitted pictures in our record was taken on the Magnuson property; the other two were taken from, or across, a lake. *Id.*)
18. Exclusion would not get Mr. Magnuson very far anyway. Because to address the previously established clearing/grading violation, Mr. Magnuson will need to submit a site plan showing what he proposes to do with the cleared area (restore versus keep, and the ultimate use of the area). Even if there had been no construction-related complaint, Local Services could not simply look the other way during its clearing/grading permit review and, paraphrasing the Wizard of Oz, pay no attention to the man behind the curtain, or in this case to a tiny house sitting smack dab in the middle of the area that needs to be brought into compliance one way or another.

Structure: Merits

19. There was some discussion about how best to categorize the tiny house. That will be important if Mr. Magnuson tries to get it permitted, but it does not change the fact *that* it requires a permit or else needs to be moved off the property regularly. A use is established after it has been in continuous operation for more than sixty days. KCC

21A.06.1347. The tiny house has been on the property for well more than sixty days. It is currently a violation.

20. Mr. Magnuson points to other RVs in the vicinity that have been onsite for significantly longer than his tiny house. On the surface, that sounds like disparate treatment. However, having reviewed well over a thousand code enforcement cases as third-party neutral (either as an ombudsman or as an examiner), we can only recall two that were Local Services-initiated, and both of those emanated from critical areas staff, not from code enforcement staff. Ms. Breazeal noted that she has open enforcement cases on five properties on Mr. Magnuson's street, including at least one of the properties Mr. Magnuson submitted photos of. But for other properties, unless code enforcement receives a complaint (from Mr. Magnuson or from some other upset neighbor), disparate treatment would be if code enforcement decided to initiate action, given that we have never seen code enforcement do that in 16 years. Code enforcement received complaints about the Magnuson property, and that is what they had a duty to investigate.

Forward-looking

21. If Mr. Magnuson chooses to resolve the clearing/grading violation by removing the added recycled asphalt and replanting the area he disturbed, he would not need a critical areas designation or a Geotech, and the permit fees will be less onerous. Ex. D16 (revised fee estimate, assuming restoration).
22. One problem is that the resulting restoration project is likely so small that it would be difficult to find a consultant for whom his project would be worth the while to take on. A simpler solution here would be for Mr. Magnuson to submit his proposal to restore the cleared area, and have Local Services provide the specific replanting requirements. To the extent specific replanting requirements are pegged to the precise critical area (and buffer) involved, Local Services can choose the most protected class of mapped critical area (and buffer) where the clearing took place (exhibit D12), and send him the plant variety-density-bonding, etc. requirements for him to implement.²
23. Conversely, if Mr. Magnuson wants to keep the tiny home permanently³ on the property and legalize the clearing (at least under and around the tiny house) and the recycled asphalt additions, that is a more complex process, given the overlapping critical area/buffers encumbering the site. It will require consultants and significantly increased permit requirements and reviews. (Local Services provided the revised fee estimate in exhibit D16 in response to Mr. Magnuson's statement at hearing that he would remove the tiny house; that reduced fee would not be applicable for an application to keep the tiny home onsite.) Such an application also has a very uncertain result, given a myriad of encumbrances, both critical area-wise and the fact that the property currently has no

² If Mr. Magnuson disputes that, he could retain a consultant to do a critical areas designation or submit a different replanting proposal.

³ When we think of "permanent," we think in terms of "existing perpetually; everlasting," or "intended to exist or function for a long, indefinite period," or "long-lasting or nonfading." *See, e.g.,* <http://dictionary.reference.com/browse/Permanent>. But, as noted above, that is not how the code demarks temporary versus permanent, setting "continuous operation for more than sixty days" as the benchmark. KCC 21.06.1345, .1347.

established primary use, such as a single family residence, that a tiny home would be accessory to.

DECISION:

1. Mr. Magnuson shall submit a complete clearing/and grading application to Local Services by **November 14, 2022**. Per paragraphs 14 and 22 above, Mr. Magnuson's application should map precisely what he cleared and where and how he plans to address that, and Local Services can provide the applicable replanting requirements consistent with the most protected class of mapped critical area (and buffer) where the clearing took place. Thereafter, Mr. Magnuson must meet all requests for information and diligently complete the permit process.
2. If Mr. Magnuson wants to keep the tiny house permanently on the property, he would start by submitting a complete application to Public Health by **November 14, 2022**.
3. No penalties shall be assessed against James and Kim Magnuson or the subject property if the above actions are completed by the above deadlines or by any reasonable extension Local Services provides. If not, Local Services may issue penalties retroactive to today.

ORDERED September 13, 2022.



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 JUNE 29, 2022, HEARING IN THE APPEAL OF JAMES AND KIM MAGNUSON, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR200688

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Jeri Breazeal, James Magnuson, and Kim Magnuson. 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 April 21, 2022
Exhibit no. D3	Appeal, received April 29, 2022
Exhibit no. D4	Codes cited in the notice and order
Exhibit no. D5	Stop Work Notice, posted August 4, 2020
Exhibit no. D6	Email on preapplication with attachments, dated January 21, 2021
Exhibit no. D7	Letter on reminder that clearing grading permit had not been applied for and advising of new complaint regarding construction, dated October 21, 2021
Exhibit no. D8	Email on follow-up, dated November 17, 2021
Exhibit no. D9	Information on tiny homes including L & I and Permitting handout
Exhibit no. D10	Information on recreational vehicles
Exhibit no. D11	Aerial photographs of subject property comparing 2019 to 2021
Exhibit no. D12	Overlays for critical areas and shorelines
Exhibit no. D13	Photographs taken by Ofc. Breazeal, dated August 4, 2020, October 5, 2021, January 21, 2022, and May 6, 2022
Exhibit no. D14	Photographs attached to complaints, dated September 24, 2021, October 19, 2021, and April 5, 2022
Exhibit no. D15	Email chain, dated July 1 to September 1, 2022
Exhibit no. D16	Revised fee quote, submitted July 20, 2020

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

Exhibit no. A1	Witness List
Exhibit no. A2	Photograph of road into lot
Exhibit no. A3	Photograph of side of road with no cuts
Exhibit no. A4	Photograph of same side of road with no cuts
Exhibit no. A5	Photograph of West side of road with no cuts
Exhibit no. A6	Photograph of roadway with vegetation
Exhibit no. A7	Photograph of 5 th wheel trailer on cleared area
Exhibit no. A8	Photograph of trailer showing gooseneck and wiring
Exhibit no. A9	Photograph of trailer showing manufactured frame
Exhibit no. A10	Photograph of vegetation showing no cut or fill
Exhibit no. A11	Photograph of trailer showing wheels and suspension intact
Exhibit no. A12	Photograph of 5 th wheel showing support by trailer frame
Exhibit no. A13	Photograph of groundcover next to trailer showing regrowth of vegetation
Exhibit no. A14	Photograph of groundcover and hill vegetation
Exhibit no. A15	Photograph of vegetation from lake to trailer 150 feet
Exhibit no. A16	Photograph of trail down to lake
Exhibit no. A17	Photograph of motorhome
Exhibit no. A18	Photograph of secondary trailer on next door neighbor's lot
Exhibit no. A19	Photograph of primary trailer on neighbor's lot
Exhibit no. A20	Photograph of both trailers on neighbor's lot
Exhibit no. A21	Photograph of ingress egress on neighbor's lot
Exhibit no. A22	Photograph of stairs leading to lake on parcel no. 4048400218
Exhibit no. A23	Photograph of continuation of stairs on parcel no. 4048400218
Exhibit no. A24	Photograph of vegetation on property

Exhibit no. A25	Photograph of ingress egress on property
Exhibit no. A26	Photograph of distance from trailer to lake
Exhibit no. A27	Photograph of bottom of the road showing the trailer
Exhibit no. A28	Photograph of lot 1 on parcel no. 4048400250
Exhibit no. A29	Photograph of paved trail to the lake on parcel no. 4048400250
Exhibit no. A30	Photograph of continuation of paved trail on parcel no. 4048400250
Exhibit no. A31	Photograph of permanent structure on parcel no. 4048400250
Exhibit no. A32	Photograph of continuation of cleared land on parcel no. 4048400250
Exhibit no. A33	Photograph of parking lot on parcel no. 4048400250
Exhibit no. A34	Photograph of concrete firepit on parcel no. 4048400255
Exhibit no. A35	Photograph of parking lot on parcel no. 4048400255
Exhibit no. A36	Photograph of trailer on parcel no. 1723069046
Exhibit no. A37	Photograph of trailer on parcel no. 1723069046
Exhibit no. A38	Photograph of trailer on parcel no. 1723069046
Exhibit no. A39	Photograph of trailer on parcel no. 1723069046
Exhibit no. A40	Photograph of trailer on parcel no. 1723069046
Exhibit no. A41	Photograph of trailer on parcel no. 1723069046

DS/lo

September 13, 2022

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR200688**

JAMES AND KIM MAGNUSON
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 13, 2022.



Lauren Olson
Legislative Secretary

Breazeal, Jeri

Department of Local Services

Lux, Sheryl

Department of Local Services

Magnuson, James/Kim

Hardcopy

Solley, Eric

Hardcopy

Van Pelt, Win

Hardcopy

Whalen, LaDonna

Department of Local Services