February 7, 2023

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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REPORT AND DECISION

SUBJECT: Department of Local Services file no. **ENFR210525**

DMITRIY AND YEKATERINA TISLENOK
Code Enforcement Appeal

Location: [redacted] Auburn

Appellants: **Dmitriy and Yekaterina Tislenok**
[redacted]
Auburn, WA 98092
Telephone: [redacted]
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King County: Department of Local Services
represented by **Jeri Breazeal**
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FINDINGS AND CONCLUSIONS:

Overview

1. Dmitriy and Yekaterina Tislenok appeal the notice and order asserting building code violations and a clearing violation. 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 find that although the Tislenoks' construction currently requires a permit, the Tislenoks may be able to reconfigure things to eliminate the need for a building permit. And we uphold the clearing violation.

Background

2. At some point after purchasing the property in October 2019, the Tislenoks began clearing portions of their property and installing buildings related to their planned commercial dog kennel. *Compare* Ex. D6 at 001 *with* 002 & 003.

3. In June 2021, the Department of Local Services (Local Services) issued the Tislenoks a notice and order asserting violations for (1) dog kennel construction, (2) placement of two commercial coaches, and (3) clearing, all without the necessary permits. Ex. D2. The Tislenoks timely appealed in July 2021.

4. We held five conferences between 2021 and 2022. The upshot was that the Tislenoks were giving up on their commercial kennel plans. That still left the structures themselves and the clearing to sort out.

5. We went to hearing on December 14, 2023, and provided the Tislenoks with a Russian interpreter. We left the record open for additional information and commentary, closing the record on January 17.

6. Unless directed to by law—and no special directive applies to today's case—the examiner does not grant substantial weight or otherwise accord deference to agency determinations. Exam. R. XV.F.3. For those matters or issues raised in an appeal statement to an enforcement action, the Department bears the burden of proof. KCC 20.22.080.G; Exam. R. XV.E.2.

Structures

Introduction

7. There are two sets of structures in play here, the (1) structures the Tislenoks constructed for their planned commercial kennel but which they now use for sheep, goats, and chickens, and the (2) cargo containers. Our either of those are currently exempt, or can be made exempt, from the need for building permit?

8. The building code starts with the presumption that anyone intending to construct a building or structure must apply for and obtain the required permit. KCC 16.02.110; IBC 105.1. However, KCC 16.02.240 exempts from building permit requirements:

> 1. One-story detached one- and two-family residential accessory buildings used as tool and storage sheds, playhouses, tree-supported structures used for play and similar uses, not including garages or other buildings used for vehicular storage, if:
>
> > 1.1 The floor area does not exceed 200 square feet (18.6 m2);
> >
> > 1.2 The roof eave does not project closer than three feet to any portion of an adjacent building and does not exceed twenty-four inches measured horizontally from the exterior wall; and

1.3 The building is separated a minimum of five feet from all other buildings.

2. One-story detached commercial agricultural and forestry accessory buildings used as animal shelters or for the storage of tools, animal feed, animal bedding, seeds, seedlings or similar materials or products, not including office, sleeping or resting quarters for human occupation or garages, if:

2.1. The floor area does not exceed 400 square feet (37.2 m2);

2.2. The roof eave does not project closer than three feet to any portion of an adjacent building and does not exceed twenty-four inches measured horizontally from the exterior wall;

2.3. The building is separated a minimum of five feet from other buildings;

and

2.4. The building does not have an installed heating system and is not connected to water, sanitary sewer or septic service.

9. Thus, accessory storage buildings not exceeding 200 ft.² in floor area, along with commercial agriculture accessory buildings not exceeding 400 ft.² in floor area, do not require a permit so long as they meet other requirement, like being separated from other buildings by at least five feet (although roof eave overhangs can get within three feet). We start by analyzing the cargo containers, before moving on to the kennels.

Cargo Containers

10. The Tislenoks' cargo containers are each approximately 320 ft.² The Tislenoks assert that these qualify as *commercial* agriculture buildings, meaning the 400 ft.², not the 200 ft.², exemption would apply. The Tislenoks certainly have some agricultural use, and on an adjacent parcel they have a pending Public Benefit Rating System (PBRS) application for farm and agricultural land credit, and an approved farm plan for that parcel.

11. The question is whether their use qualifies as "commercial agriculture." We do not give deference to agency interpretations, but we find persuasive the framework explained by Eric Beach (who works for a different agency, not Local Services, and tries to promote agriculture County-wide). Qualifying for *commercial* agricultural treatment requires three years of completed IRS schedule F filings to demonstrate an agricultural business, a current USDA organic certification certificate, and an enrollment in the *State*'s farm and agricultural land taxation program. Ex. D12. The Tislenoks' operations do not currently qualify, nor will they qualify in the foreseeable future even with an approved farm plan, as commercial agriculture. So Local Services is correct that the 200 ft.², not 400 ft.², limit applies.

12. However, Mr. Tislenok notes that before he brought on the containers, he queried Local Services whether those containers needed permits. He received a response from Local Services, the most pertinent part of which was:

> Per the zoning certification letter issued, commercial kennels are permitted accessory to residential uses as a home occupation. But to recap our conversation, you believe you had been informed that you did not need a building permit for storage containers. In cases where a structure under 200 sf (or 400 sf on properties greater than 10 acres) and are being used strictly for residential (personal) storage (including cargo/shipping containers), then a building permit is not required. In your case, the building is not being proposed for storage, it is being proposed for housing dogs. This requires a permit in order to receive a certificate of occupancy.

Ex. A2 at 001. Mr. Tislenok testified that he brought the containers on only after receiving that email, which he interpreted as meaning that so long as they were used for storage, they could be up to 400 ft.² without triggering permit requirement. He thus requests that we allow him to keep the two 320 ft.² containers for storage use, without him having to obtain building permits.

13. Local Services counters that the email was only restating *Mr. Tislenok*'s position and not providing a Local Services' position on the topic. That is certainly true of the second sentence ("…you believe…"). The critical question is whether the third sentence, the one containing the misinformation—that structures up to 400 ft.² being used strictly for residential (personal) storage (including cargo/shipping containers) do not require a building permit—is a continuing recap of Mr. Tislenok's position or Local Services offering its own (mis)assessment.

14. We interpret it as the latter. The third sentence starts with, "In cases where" and opines that the square footage allowance applies to buildings "being used strictly for residential (personal) storage (including cargo/shipping containers)." It is unlikely Mr. Tislenok, especially given the language barrier, would have asserted he was using the containers "strictly for (personal) storage." The fourth sentence then explains why the general exception sketched out in the third sentence would be inapplicable to kennel operations.

15. The next question is whether that misstatement gets Mr. Tislenok out of the permit box. It is essentially an equitable estoppel[1] argument, that because Local Services told him, before he brought the containers on, that if they were under 400 ft.² and used strictly for residential storage they would not require for building permit, we should not allow Local Services to change its position and now require a permit. It is not the type of argument Local Services tackles, and past attempts to raise the argument to an examiner have proven unsuccessful.

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[1] "Establishment of equitable estoppel requires proof of (1) an admission, act or statement inconsistent with a later claim; (2) another party's reasonable reliance on the admission, act or statement; and (3) injury to the other party which would result if the first party is allowed to contradict or repudiate the earlier admission, act or statement." *State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 20, 43 P.3d 4, 14 (2002) (citations omitted).

16. Equitable estoppel against the government is disfavored, and must both be necessary to prevent a manifest injustice *and* not impair the exercise of government functions.[2] Certainly, as the email points out, cargo containers are tough to bring up to building code standards and require a professional architect; getting a permit is no simple task. Ex. A2 at 001. Yet past appeals where someone raised an equitable claim, we have denied it, even where the burden on the appellant was significant. But those scenarios involved truly impairing government functions, like someone asking to avoid a permit to legalize actual living space (and all the life/safety issues that entails) or to essentially allow a bootlegged septic system (with all the deleterious health effects that could create), or to skirt around critical areas/stormwater runoff requirements (which are essentially State mandates limiting local government's, including an examiner's, flexibility).

17. Today's scenario is different. We deal here only with two storage units approximately 120 feet over the square footage that would exempt them from needing a permit. Allowing those to remain as-is does not impair a government function. The Tislenoks must scale back the overhang joining the two coaches (because the exemption applies only to "detached" buildings) and demonstrate (on a site plan) that the containers themselves are at least five feet away from other buildings (Mr. Tislenok testified that they are separated by eight feet), with any remaining roof eaves at least three feet from each other and extending no more than two feet. But if they meet that, and thereafter to use them only for storage, the Tislenoks need not obtain a building permit.

Former Kennels

18. As noted above, the Tislenoks do not qualify for commercial agricultural treatment. And there is nothing in the record showing the Tislenoks were misled about anything related to the kennels themselves. Plus, what they constructed was many multiples of 400 ft.^{2} anyway. So, 200 ft.^{2} is the maximum floor area without triggering a permit.

19. The Tislenok have removed some of the intervening roof panels such that each *roofed* area is apparently not more than 200 ft.^{2} Ex. A3 at 013. However, the kennels are still all one joined mass many multiples beyond 200 ft.^{2} What is there now does not even come close to meeting the requirement for "detached" buildings.

20. To get out of the permit box, the Tislenoks will need to remove multiple sections of roofing beams and side panels to leave a series of stand-alone (meaning <u>not</u> joined to anything) 200 ft.^{2}-or-less-of-floor-area accessory buildings. The remaining construction must be truly "detached," meaning completely separated by at least five feet from every other building (with any remaining roof eaves at least three feet from each other and extending no more than two feet).

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[2] *Campbell & Gwinn*, at *id.*

Clearing and Grading

Introduction

21. Although we listed *grading* as an appeal issue, in re-reading the notice and order, we realize that it only alleged a *clearing* violation, not a separate grading violation.[3] In many respects, the terms intersect. For example, "grading" means "any excavating, filling or land-disturbing activity, or combination thereof," with "land disturbing activity" itself defined as activity resulting "in a change in the existing soil cover, both vegetative and nonvegetative, or to the existing soil topography." KCC 16.82.020.O & Q. And clearing includes "the cutting, killing, grubbing or removing of vegetation or other organic material by physical, mechanical, chemical or any other similar means." KCC 16.82.020.D. But technically our issue on appeal is how much the Tislenoks *cleared*.

22. In setting out the issues for hearing, we stated that:

> It will be Local Services' burden to show approximately how much clearing and grading (defined above) occurred.
>
> It will be the Tislenoks' burden to show how much, if any, of that clearing/grading was exempt, for example, "Here are pictures/diagrams showing that ___ square feet of the cleared area was entirely blackberries [a noxious weed] and that ___ square feet was just routine maintenance of a gravel driveway." KCC 16.82.051.B & .C provide a list of possible exceptions.

23. Mr. Tislenok was under the impression that "clearing" was limited to cutting actual trees; however, as noted above, the definition is much broader. KCC 16.82.020.D. In terms of how much actual clearing the Tislenoks undertook, exhibit D6 at 001 presents the best "before" picture of what the property looked like when they purchased it in October 2019. And 002 shows bare earth where the Tislenoks had cleared up to May 2020, with 003 showing them clearing eastward by August 2020. Local Services did not provide a square footage estimate, but it is obvious that the bare-earth cleared area is many multiples of 7000 $ft.^2$, triggering the need for a clearing permit.

24. Much of that area could conceivably count as both clearing and grading; the Tislenoks did not, for example, selectively cut and remove certain plants ("clearing"), they apparently changed the existing vegetative soil cover by scraping it all off and leaving bare earth ("grading"). But, again, the notice and order did not assert a grading violation, and (as discussed below) the only grading-related finding we make relates to the driveway.

25. Mr. Tislenok asserts that much of the areas they cleared had blackberries, but they did not provide a specific representation of what blackberries were where. The Tislenoks can provide specific details of blackberry areas when they submit a proposal (in case the

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[3] Violation (3) involved clearing exceeding a cumulative 7000 $ft.^2$ The first two violations related to the building construction. Ex. D2 at 001.

existence of blackberries impacts what he may need to replant). The contours of the cleared area Mr. Tislenok needs to address are the bare-earth areas shown in the May 2020 or August 2020 photos. Ex. D6 at 002-03.

26. In addition to the discussion above about "grading" in terms stripping away the vegetation layer, Local Services asserts "grading" in the sense of adding impervious surface. Local Services points to the area in page 007 of exhibit D6 as newly graveled area. Unlike the vague references to blackberries, for gravel Mr. Tislenok *did* provide actual photo and a calculation, along with testimony on what he graveled.

27. Mr. Tislenok estimates he brought in between five to six cubic yards, adding maybe an inch or inch and ½ to the driveway. A pre-existing gravel driveway is clearly visible in a 2018 photo. Ex. A3 at 005. And while the Tislenoks expanded the gravel area where the driveway meets the kennel area and extending into the kennel area—areas not visible in the 2018 photo—most of that gravel appears to have been placed within the footprint of the pre-existing gravel driveway. *Compare* pages 005 *with* 007 in Ex. A3.

28. So, have the Tislenoks shown that the driveway area they added gravel to here was normal and routine maintenance that did not expand roadway, such that it qualifies as an exception for maintaining a driveway or private access road? KCC 16.82.051.C.13. As we have tackled in length in several previous decisions, the line between routine road maintenance and creating a new impervious surface is not always a bright one. Here we find that much of the driveway depicted in exhibit A3 at 008 (basically the long, thin part) was exempt maintenance and not the creation of new impervious surface.

29. It is unclear how much new impervious surface the Tislenoks have added outside the pre-existing driveway prism, namely where the driveway enters into the kennel area. Often, that is a critical decision to make, because whether the appellant needs to apply for a permit or not turns on whether they created over 2000 $ft.^2$ of impervious surface. KCC 16.82.051.C.2. Here, the notice and order did not even allege an impervious surface-related violation. The new covered areas themselves, such as the shipping containers and covered kennel portions, are apparently approaching 2000 $ft.^2$ all by themselves. Ex. D6 at 006. And the Tislenoks will need to address any covered areas added since they purchased the property, and what areas they intend to retain, in their permit submittal materials. We enter no finding on impervious surface other than the gravel added to the long thin driveway here is exempt and does not create new impervious surface.

30. The Tislenoks note that the area between the containers and the far edge of the kennels have all been laid with wood chips and bark. Ex. A3 at 010. Whether those bark wood/chips areas count as sufficiently pervious to not trigger certain drainage review is a question for permit review staff. Code enforcement cannot answer that question and neither can we. The same goes for whether, for example, the Tislenoks clearing vegetation but then planting trees (both evergreen and fruit) and grasses qualifies as sufficient remediation.

Next Steps

31. So where does that leave us. The current configuration of the cargo containers and former kennels all require a building permit. However, if the Tislenoks successfully follow the steps outlined in paragraphs 17 and 20, neither the converted kennels nor the coaches will require building permits. To avoid further confusion, and so the Tislenoks do not find themselves having to dismantle construction *twice*, they should include a site plan proposing *how* they intend to reconfigure the structures (with detailed square footage, building separation, and roof separation calculations) in their pre-application materials and wait for further review before actually undertaking the work.

32. As to the clearing violation, as Local Services noted at hearing, the requirements (such as replanting) may have changed now that the Tislenoks are no longer proposing commercial kennel operations. Local Services pointed specifically to the vegetation buffers required around commercial kennel operation that would no longer be required now that the Tislenok have ceased kennel operations. Local Services' suggestion that a second preapplication meeting (in keeping with our findings and conclusions in today's decision) would help advance the ball is a sound one.

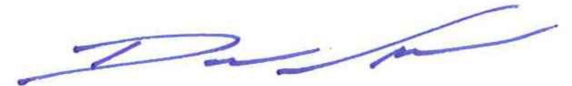
DECISION:

1. The accessory structures (dog kennels and cargo containers) are currently in violation, being over the size limits to trigger a building permit. However, if they successfully follow the steps outlined in paragraphs 17 and 20, neither the converted kennels nor the coaches will require building permits.

2. The Tislenoks cleared many multiples of the 7000 $ft.^2$ requiring a clearing permit. By **March 8, 2023**, they must submit a complete prescreening meeting request for a clearing/restoration permit. Thereafter, diligently complete the permit process.

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

ORDERED February 7, 2023.



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 Petit W Act, Chapter 36.70C RCW.

MINUTES OF THE DECEMBER 14, 2022, HEARING IN THE APPEAL OF DMITRIY AND YEKATERINA TISLENOK, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR210525

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Jeri Breazeal and Dmitriy Tislenok. 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 14, 2021
Exhibit no. D3	Appeal, received July 9, 2021
Exhibit no. D4	Codes cited in the notice and order
Exhibit no. D5	Aerial photographs of subject property, dated 2021 vs. 2019
Exhibit no. D6	Aerial photographs of subject property, dated October 2019 to July 2022
Exhibit no. D7	Sale photographs and descriptions
Exhibit no. D8	Excise tax statement, dated October 2019
Exhibit no. D9	Letter regarding zoning
Exhibit no. D10	Email on pre-application meeting follow-up
Exhibit no. D11	Approval from Health Department on building placement related to septic
Exhibit no. D12	Definition of Commercial Agriculture Forestry, from Eric Beach, submitted December 27, 2022

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

Exhibit no. A1	Summary list
Exhibit no. A2	Email from Warren Clauss, dated 2021
Exhibit no. A3	Photographs, dated 2005, 2007, 2015, 2018, and 2021; Single Family 360 Property View summary; and photograph of green sheds
Exhibit no. A4	Letter from Warren Clauss, dated November 5, 2019
Exhibit no. A5	Payment receipt, dated July 7, 2021
Exhibit no. A6	Invoices
Exhibit no. A7	Basis of Planting Requirements, submitted December 14, 2022
Exhibit no. A8	Email exchange post hearing

February 7, 2023

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR210525**

DMITRIY AND YEKATERINA TISLENOK
Code Enforcement Appeal

I, Jessica Oscoy, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND DECISION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

☒ placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED February 7, 2023.

Jessica Oscoy
Office Manager

Breazeal, Jeri
Department of Local Services

Campbell, Thomas
Department of Local Services

Harris, Cortlee
Department of Local Services

LaCaille, Jerry

Tislenok, Dmitriy/Yekater Mr.
Hardcopy