

November 29, 2023

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

King County Courthouse
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REPORT AND DECISION

SUBJECT: Department of Local Services file nos. **ENFR221021 & E1000431**

JEFF THURLOW AND CAROLYN BARRETT
Code Enforcement Appeal

Location: [REDACTED] Vashon

Appellants: **Jeff Thurlow and Carolyn Barrett**

[REDACTED]
Vashon, WA 98070

Telephone: [REDACTED]

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King County: Department of Local Services
represented by **Cortlee Harris**
Department of Local Services
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FINDINGS AND CONCLUSIONS:

Overview

1. Jeff Thurlow and Carolyn Barrett appeal part of a supplementary notice and order related to grading and clearing. 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 deny the appeal as to grading and grant it as to clearing. We also clarify the "next steps" in the permit process.

Background

2. After Appellants purchased their property in 2006, they undertook various building-related activities. The building code starts from the broad default that anyone intending “to construct, enlarge, alter, repair, move [or] demolish” a building must apply for a building permit. KCC 16.02.110; IBC 105.1. There are some limited exceptions to this blanket permit requirement, but typically for minor work like “[p]ainting, papering, tiling, carpeting, cabinets, counter tops and similar finish work.” KCC 16.02.240.7. Appellants do not allege that their construction efforts fit into one of these exceptions, and they would not have been successful if they had.
3. Appellants started the building permit process, but that process has been slow going. We will return to next-steps at the end, but that was not the dispute that prompted our hearing. Instead, in the summer of 2022, Appellants dug stairs into their hillside, improving an existing trail to allow useable access to their proposed septic drainfield. Ex. D6. This prompted another neighbor complaint. Local Services issued a supplementary notice and order re-citing them for the (1) original building-related work without a permit, but also for (2) clearing in excess of 7000 cumulative square feet and grading, both within critical areas. Ex. D2.
4. Appellants challenged the clearing and grading violation, asserting that they had not cleared close to 7000 ft.², that what they removed was noxious weeds like blackberry and Ivy, and that they had replanted those with native sword ferns, fine maples, cedars, furs, salal, and huckleberries. Ex. D2. We went to hearing on November 7.

Legal Standard

5. The code’s default is that—unless specifically excepted—a person shall not do *any* clearing or grading without first obtaining a clearing and grading permit from Local Services. KCC 16.82.050.B. As listed below, the definition of “grading” is broad, an “clearing” broader still, meaning anyone who works any ground or vegetation in unincorporated King County, in almost any manner, has “cleared” or “graded.” Each person who mows the lawn in the summer, prunes back the hedges in the fall, or tosses down some gravel to fill in a walkway’s wet low spots in the winter, would have the burden to affirmatively demonstrate a narrowly-interpreted exemption to the requirement to obtain a permit.
6. To avoid that absurd result, we have consistently required Local Services to assert and then (if appealed) to put on proof at hearing of clearing or grading either in excess of one of the first three numbered threshold exceptions in KCC 16.82.051.C—excavation over five feet deep/fill over three feet high, adding over 2,000 ft.² of new or replaced impervious surface, or clearing over 7,000 ft.²—or in a location or of a nature where the three threshold triggers do not apply, such as certain critical areas and their buffers. That is why Local Services framed the violation here in terms of cumulative clearing in excess of 7000 ft.² and grading, and with critical areas or their buffers. Ex. D3 at 003 (“2. Clearing....”).

Analysis

Grading

7. We start with the low-hanging fruit of “grading,” defined as “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. C. There are grading carveouts among the first three numbered threshold exceptions, like excavation less than five feet in vertical depth or adding less than 2000 ft.² of new impervious surface on a single site after January 1, 2005. KCC 16.82.051.C.1 & .2.
8. However, those exceptions do not apply to grading in a steep slope hazard and its buffer. KCC 16.82.051.B (first line of table). Appellants cut the stairs into a steep slope hazard area/buffer and dug down about a foot to flatten other areas out, adding some gravel in places. Exs. D5, D10; Thurlow testimony. That work was not exempt from a grading permit, regardless of the extent of the grading (i.e., by code, there is no minimum threshold below which grading on a steep slope does not trigger the need for a permit). It is not clear at this point if that will require a standalone grading permit, or if that can be looped into an amended building permit application for their construction. But Local Services has shown a grading violation.

Clearing

9. The basic clearing exemption is “cumulative clearing” of less than 7000 ft.² KCC 16.82.051.C.3. For years we have criticized this provision and sought to get someone’s attention—either in the executive or legislative branch—to clarify it. We attached the relevant portion from our most recent annual report. Ex. E1. To summarize, for the other exemptions, there is fixed date baseline to measure from and/or some allowance for some additional clearing and/or grading without a permit (like the 2000 ft.² of new impervious surface added to a single site after January 1, 2005) mentioned above. KCC 16.82.051.C.2. But not for “cumulative clearing” and for “cumulatively over time.” KCC 16.82.051.C.1, .C.3 & .C.8.
10. *Most* sites with a pre-existing home will typically have over 7,000 square feet of “cleared” space. Thus, beyond something like maintaining a pre-existing lawn, *any* clearing triggers a permit. As Local Services’ bulletin on the topic phrases it, once a “site already exceeds 7,000-square-feet of cleared area, any additional clearing requires a permit.” Thus trimming even a small new area would trigger the need for a permit. That seems nonsensical and harsh.
11. And what does “cumulative” really mean? What if a forested area was cleared decades ago, but has since regrown with native vegetation—does this subtract from the cumulatively cleared total? There may be a void-for-vagueness challenge coming.
12. As Jeri Breazeal noted, the limit likely stems from state and federal clean water-related requirements. Yet it seems axiomatic that paving over a grassy area post-2005 with 2000 ft.² of asphalt creates more drainage/runoff/water quality impact than, say, replacing

2000 ft.² of native vegetation with landscaping while keeping that surface pervious. Yet, the first would be exempt from a permit but the second would not?

13. Citing Appellants is especially problematic here, because the total cleared areas on the property Local Services pointed to are together only just over 7000 ft.² minimum. Ex. 9 (7622 ft.²). Much of that includes buildings that were around decades before there were any environmental/regulatory clearing restrictions. See, e.g. Ex. A10 at 001-05. And while Local Services did not calculate square footage they believed Appellants cleared after their 2006 purchase, there is no question that total amount was a small percentage of 7000 ft.² We adopt Appellants' calculation that they have cleared less than 1400 ft.², with most of that encompassing the trail that prompted the new notice and order. Ex. A7 at 001. And even applying a more expansive and unbounded view of “cumulative” clearing, Appellants have nipped away at Local Services' calculations such that Local Services' has not shown a cumulative 7000 ft.². Ex. A13 at 006-08.
14. Unless the code is amended in the interim, the next time Local Services assert a clearing violation of over 7000 cumulative ft.², where there has not been 7000 ft.² of new activity since the modern grading code/critical areas ordinance went into place at the beginning of 2005, Local Services shall prepare, as part of its staff report, a detailed explanation of the local legislative history, and the state and federal restrictions, and why—although the County has the flexibility to allow someone to add 2000 ft.² of impervious surface without needing a permit—any new clearing should require a permit.
15. The issue here is a red herring, because the clearing Appellants performed as part of their trail project was in a steep slope hazard and buffer. And, as with grading, there is no square footage in a steep slope hazard and its buffer below which a permit is not required. KCC 16.82.051.B (second line of table). The footprint of the trail they dug will already need to be reviewed as part of the grading permit application (or as part of an amended building permit application if those can be combined). And at a certain point “clearing” and “grading” intersect, because “grading” included “land disturbing activity,” which included changing the existing, vegetative soil cover. KCC 16.82.020.O & Q. C.
16. So, where does that leave us? There was some other noxious or invasive vegetation they removed beyond the prism of the trail, but they have since replanted with native vegetation. Ex. A11. *Compare* Ex. D5 at 003 (bottom) *with* Ex. D6 at 005. Their efforts appear to meet the critical area code's standards removal of “noxious weeds” and “invasive vegetation” in a steep slope hazard and its buffer, as they: (1) worked with hand labor, including hand-held mechanical tools, (2) stabilized the area (covering the bare soil first with hay and later with more) to avoid regrowth or regeneration of noxious weeds, and (3) revegetated the cleared area with native vegetation and stabilized against erosion, even adding irrigation to enhance the plants' survival. KCC 21A.24.045.C.23; Ex. D6; Thurlow testimony.
17. We do not find a clearing violation separate from the grading violation.

Next Steps

18. There are a few moving parts here. The home remodel/expansion triggered the need for a new septic system; apparently that is still in flux. And they will need a critical areas designation (CAD) as part of the septic. Per Ms. Breazeal’s November 9 email, they should submit for the CAD first. Ex. D14.

DECISION:

1. We deny the appeal as to grading in a steep slope hazard and buffer and grant it as to a separate clearing violation.
2. By January 29, 2023, apply for a critical areas designation (CAD). Thereafter diligently follow the compliance timing and sequence laid out by Local Services. Be sure to keep Ms. Breazeal in the loop and ask for any necessary extensions *before* a deadline expires.
3. No penalties shall be assessed against Jeff Thurlow and Carolyn Barrett or the subject property if the above actions are completed by these deadlines, or by any reasonable deadline extension Local Services provides. If not, Local Services may issue penalties retroactive to today.

ORDERED November 29, 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 Petition Act, Chapter 36.70C RCW.

**MINUTES OF THE NOVEMBER 7, 2023, HEARING IN THE APPEAL OF JEFF THURLOW AND CAROLYN BARRETT, DEPARTMENT OF LOCAL SERVICES
FILE NO. ENFR221021 & E1000431**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Jeri Breazeal, Jeff Thurlow, and Carolyn Barrett. 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
Exhibit no. D2	Notice and order, issued July 13, 2023
Exhibit no. D3	Appeal, received August 2, 2023
Exhibit no. D4	Codes cited in the notice and order
Exhibit no. D5	Photographs of trail, dated on September 6, 2022
Exhibit no. D6	Photographs of trail, dated on October 17, 2023
Exhibit no. D7	Photographs of house, dated on October 17, 2023
Exhibit no. D8	PREA21-0040 follow up email
Exhibit no. D9	Aerial photographs of subject property with calculations, dated April 26, 2023
Exhibit no. D10	Aerial photographs of subject property with overlays
Exhibit no. D11	Aerial photographs of subject property with dates
Exhibit no. D12	Assessors information
Exhibit no. D13	Email with code section, dated November 7
Exhibit no. D14	Email from Ofc. Breazeal, dated November 9

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

Exhibit no. A1	Local Services exhibits 1 & 2 with our highlighting
Exhibit no. A2	Previously submitted site plan
Exhibit no. A3	Geotech report
Exhibit no. A4	CAD
Exhibit no. A5	Septic Permit
Exhibit no. A6	Assessor reports and road history
Exhibit no. A7	Historic photos
Exhibit no. A8	Site plan with our clearing and grading estimates
Exhibit no. A9	King County noxious weeds
Exhibit no. A10	2006 photos
Exhibit no. A11	Noxious weed on our property
Exhibit no. A12	Orchard trail established 1940's
Exhibit no. A13	Appellant's report

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

Exhibit no. E1	Pages 18-19 Hearing Examiner 2022 Annual Report
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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file nos. **ENFR221021 & E1000431**

JEFF THURLOW AND CAROLYN BARRETT
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, Quadiant-Impress, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED November 29, 2023.



Lauren Olson
Legislative Secretary

Breazeal, Jeri

Department of Local Services

Campbell, Thomas

Department of Local Services

Carolyn Barrett, Jeff Thurlow

Hardcopy

Harris, Cortlee

Department of Local Services

Stephens, Nick

Department of Local Services

Whalen, LaDonna

Department of Local Services