April 30, 2024

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

ORDER DENYING MOTION FOR RECONSIDERATION

SUBJECT: Department of Local Services file no. **ENFR230810**

WHERE ITS GREEN LLC
Code Enforcement Appeal

Location: [redacted] Duvall

Appellant: Where It's Green LLC
represented by **Dave Beecher**
[redacted]
Redmond, WA 98053
Telephone: [redacted]
Email: [redacted]

King County: Department of Local Services
represented by **Ben Hossienzadeh**
Department of Local Services
919 SW Grady Way Suite 300
Renton, WA 98057
Telephone: (206) 263-2196
Email: bhossienzadeh@kingcounty.gov

Introduction

1. Despite having prevailed on the thorniest issues in its appeal, David Beecher/Where It's Green LLC (Appellant) filed a motion (Motion) for reconsideration of the Examiner's April 4, 2024, Report and Decision (Decision). This Order addresses each contention, although the Examiner already directly addressed many of them in her opening remarks at hearing and in the Decision itself.

Alleged Procedural Discrepancies

Bullet 1: Insufficient consideration of Appellant's filed exhibits.

2. Appellant contends that the Examiner overlooked or dismissed his exhibits without adequate consideration. He does not identify the exhibits which he believes were overlooked or insufficiently considered.

3. Appellant filed 60 exhibits totaling 167 pages. They were not organized in any fashion the Examiner was able to discern.

4. At the beginning of the hearing, the Examiner explained that she had reviewed all Appellant's proposed exhibits and requested that he draw her attention to those he considered particularly noteworthy.

5. Based on Appellant's exhibits and clarifying testimony, the Examiner concluded that the Department of Local Services – Permitting Division (Permitting) had not borne its burden of proof on its allegation that Appellant or his tenants had cleared vegetation within steep slope and/or aquatic area critical areas and/or their buffers.

Bullet 2: Assignment of the case to the undersigned Examiner

6. Appellant alleges that the Examiner did not fully understand agreements he contends were reached in the prehearing conference. He does not specify the "agreements" he argues were reached at the prehearing conference. Nor does he apparently understand the purpose of the prehearing conference which, as explained in Rule VIII.A of the Examiner's Rules of Procedure and Mediation (Rules), is to provide an informal avenue for identifying issues and discovery needs early and for resolving procedural matters in complex cases. Rule VIII.B identifies the actions the Examiner may take for following the prehearing conference, including identify, clarify, limit, consolidate or simplify issues. The February 20, 2024, Notice of Remote Hearing provided a link to the Rules.

7. As the Examiner explained at the outset of the hearing:

> I did listen in full to the prehearing conference that Examiner Spohr heard, so I am familiar with all of the issues that were discussed then. The issues in this hearing today will be limited to the four that were identified in the Prehearing Order. So I will not be considering exhibits offered by the Appellant in his prehearing filings that relate solely to septic issues.

Bullet 3: Post hearing submissions

8. Violation 1 in the Notice and Order alleges clearing within aquatic areas and/or their buffers. Ex. D2-001.

9. The aquatic area at issue is a Type F stream. Decision, Finding 7.

10. KCC 21A.24.358 requires a 165-foot buffer for a Type F aquatic area outside of the urban growth area. Appellant's property is outside of the urban growth area. Unlike for wetlands, the buffer width for aquatic areas is not based on the intensity of the adjacent use. Compare KCC 21A.24.325.

11. At the hearing, Appellant argued that, under the King County Code (Code), the presence of a road terminates an aquatic area buffer. Officer Hossienzadeh responded that the relevant Code provision applies to a public road not a private road or driveway such as those on Appellant's property. The Examiner left the record open until the end of the day for Permitting to submit the relevant code provision.

12. Based on Appellant's exhibits and testimony, the Examiner found:

> The Examiner cannot find that the clearing took place within a steep slope, aquatic area or their buffers. Decision, Finding 20.

In rendering Finding 20, the Examiner found that clearing that had occurred was more than 165 feet from the Type F stream. Consequently, the Examiner did not consider Permitting's post-hearing submission.

Bullet 3: Issues outside of the scope of the appeal

13. As Examiner Spohr patiently explained during prehearing conference, the scope of the appeal hearing is limited to the violations alleged in the December 11, 2020, Notice and Order. The Notice and Order does *not* allege *operation* of a kennel.

14. The scope of the appeal hearing was limited to the four issues identified in the February 20, 2024, Notice of Remote Hearing, which included as Issue D the conversion of cargo containers into dog kennels without the required permits and inspections and approvals. The issue did *not* include operation of dog kennels.

15. In a March 4, 2024, email (attached to the Motion), the Examiner's office reminded Appellant:

> [A]s Examiner Spohr explained to you in the January 29 prehearing conference, the scope of the appeal hearing is limited to the violations alleged in the December 11, 2020, Notice and Order. Through its exhibits and testimony, the Department must demonstrate by a preponderance of the evidence that the alleged violations occurred or are occurring.
>
> Your **bullet points 3 and 4** (alleged "bait and switch" fee structure and violation of fair business practices) are outside of the scope; therefore, the Examiner will not consider them or allow exhibits or testimony related to them at this appeal hearing.

> The Examiner will allow you some leeway on your **bullet points 2 and 5** (alleged disparity in kennel regulations and Title 23 abuse). Discussion of kennel regulations will be limited to the County's regulations and their application to you. Discussion of Title 23 will be limited to the Department's [compliance] with its applicable requirements. (Emphasis in original).

16. In retrospect, the email reference to kennel regulations was misplaced. Based on Officer Hossienzadeh's testimony that Permitting did not allege operation of a dog kennel but only the conversion of cargo containers to dog kennels, the Examiner appropriately chose not to permit testimony or enter exhibits regarding *operation* of a dog kennel.

17. Appellant did not present any evidence that Permitting had failed to comply with Title 23 KCC.

Alleged Substantive Issues

Bullet 1: Burden of proof/nonconforming uses

18. While not using the term, at the hearing and in its Motion, Appellant essentially argues the cargo containers constitute legal nonconforming uses and that the Examiner inappropriately shifted the burden of proof onto the Appellant to demonstrate that the containers constitute a legal nonconforming use. There are several flaws with this argument.

19. First, the appeal statement does not even mention the cargo containers. The scope of an appeal is limited to matters or issues raised in the appeal statement and in the amendment to the appeal the examiner may authorize. KCC 20.22.080.G.

20. Second, as stated in Finding 35, when both the Examiner and Permitting directly asked Appellant whether the cargo containers were present when he acquired the property in 2017, Appellant evaded the question. Decision, Finding 35.

21. Third, KCC 21A.06.800 defines nonconformance as:

> [A] use, improvement or structure established in conformance with King County's rules and regulations and other applicable local and state laws and regulations in effect time use, improvement or structure was established that no longer conforms to King County's rules and regulations for other applicable local and state rules and regulations due to changes in the rules and regulations or their application to the subject property.

22. There is no evidence in the record that the cargo containers were legally placed on the site. Indeed, after checking records back to 1987, Permitting determined that it has not issued permits for either the placement of the shipping containers or their conversion to dog kennels. Decision, Finding 3.

23. Fourth, the Examiner expressly found a comparison of the 2019 and 2023 aerial photographs in exhibits D7-001 and D7-003 indicate that the cargo containers were placed on the property sometime between 2019 and 2023. Decision, Finding 36.

24. The initial burden of proving the existence of a nonconforming use is on the land user making the assertion. *Van Sant v. City of Everett*, 69 Wn. App. 641, 849 P. 2d 1276 (1993). Appellant did not carry that burden.

Bullets 2 and 3: Enforcement and post hearing submittals

25. Presumably, Appellant's reference to "high impact" uses comes from Exhibit D10, in which Permitting describes the buffer that would be required for moderate and high impact uses adjacent to a wetland. As explained in Finding 12 above, the Examiner did not consider this exhibit.[1]

Constitutional Issues

26. Rule III.A.1 provides:

> The examiner's jurisdiction is limited to matters specifically identified in the KCC or assigned to the examiner by County ordinance or Council motion. Equitable defenses or claims based on the constitutionality of County regulations may be raised to exhaust administrative remedies and make a record for judicial review, but they are beyond the examiner's jurisdiction to decide.

27. Appellant did not make an offer of proof as to his constitutional arguments.

Road Maintenance

28. The Examiner carefully considered Appellant's testimony regarding historical roads on the property and carefully scrutinized the exhibits Appellant used to support his case.

29. As explained in Findings 29 and 30 of the Decision:

> No clearing and grading permit is required for normal and routine maintenance of a private access road if:
>
> a. there is no alteration of a ditch or aquatic area that is used by salmonids:
>
> b. *the* structure, condition or *site maintained* was constructed or created in accordance with law; and
>
> c. the maintenance *does not expand* the roadway, lawn, landscaping, ditch, culvert or other improved area being maintained. KCC 16.82.051.C.13. (Emphasis added in *italics* in the Decision).

[1] It is unclear why Permitting discussed wetland buffers in Exhibit D10 as it did not allege clearing within wetlands or their buffers.

> While there may have historically been informal access roads crossing some portions of the area of clearing, there is no evidence in the record that the roads were constructed in accordance with the Code. Further, **Appellant conceded that the roads had been "neglected for a while" and not maintained**. Moreover, the oval shaped area clearing exceeds the area of potentially historic access roads. Consequently, the clearing does not fall within the exemption for normal and routine maintenance of a private access road. Testimony of David Beecher. (Emphasis added in **bold** in this Order).

Conclusion

The Motion for Reconsideration is **DENIED**.

The requirement that Appellant, "Submit a complete pre screening meeting request to PERMITTING within 30 days of this decision" is amended to, "Submit a complete pre screening meeting request to PERMITTING within 30 days of today's order."

This order is the Examiner's final word on the matter.

DATED April 30, 2024.

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.

April 30, 2024

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

CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR230810**

WHERE ITS GREEN LLC
Code Enforcement Appeal

I, Lauren Olson, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **ORDER DENYING MOTION FOR RECONSIDERATION** 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, through Quadient-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 April 30, 2024.

Lauren Olson

Lauren Olson
Legislative Secretary

Beach, Eric
Ombudsman's Office

Beecher, Dave
Hardcopy

Breazeal, Jeri
Department of Local Services

Campbell, Thomas
Department of Local Services

Hossienzadeh, Ben
Department of Local Services

Whalen, LaDonna
Department of Local Services

Where It's Green LLC