November 14, 2024

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REPORT AND DECISION

SUBJECT: Department of Local Services file no. **ENFR240087**

YUKI ITO AND ARIE VAN DER HOEVEN
Code Enforcement Appeal

Location: [redacted] Redmond

Appellants: **Arie and Yuki van der Hoeven**
[redacted]
Redmond, WA 98053
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King County: Department of Local Services
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FINDINGS AND CONCLUSIONS:

Overview

1. The Department of Local Services (Local Services) issued Arie and Yuki van der Hoeven a notice and order asserting: (1) placement and use of a tiny house/recreational vehicle (RV) as an accessory dwelling unit, (2) conversion of a shed into accessory living quarters without the required permits, and (3) clearing and grading—all without the necessary permits, some within critical areas or their buffers, and the tiny house/RV and shed being within the property line setback. The van der Hoevens (Appellants) filed a timely challenge, and we went to hearing. After entertaining the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, we partially grant and partially deny the appeal.

Introduction

2. This turned out to be the most involved decision in our dozen years as the examiner. There were complex individual components, like classifying the "tiny house" and its use, or determining when pea gravel counts as impervious surface, or deciphering square footages and critical areas buffer boundaries. Yet what made this case unique (a term we do not use loosely, since it means "the *only one* of its kind") was how many items figured into all three phases (building code, clearing and grading, and critical areas). And if weaving it all together simply relying on words was tough for us, heaven help the reader; this necessitated the arduous task of cropping and reproducing portions of almost 40 exhibits to illustrate points. That perfect storm has resulted in our longest (by far) and most tardy (by far) decision among the thousands we have penned.

3. After tinkering with several organizational approaches, we ultimately structured the below analysis as:

   A. Start with the tiny house/RV and shed, momentarily setting aside clearing, grading, and critical areas while we focus on those just as "buildings," occupation, and property line setback; then

   B. Advance to analyzing clearing for the entire parcel and then grading for the entire parcel, including classifying pea gravel, assessing hazardous tree removal, and estimating square footage totals, while still holding critical areas in abeyance; and

   C. Finally, delineate the four critical area buffers (an eastern wetland and steep slope, and a western wetland and steep slope) and address construction, clearing, and grading within each of the four buffers.

4. In weighing the exhibits, testimony, and argument, Local Services bears the burden of proving, by a preponderance of the evidence, those matters raised in an appeal statement. Exam. R. XV.E.2 & F.1. And an "examiner only grants substantial weight or otherwise accords deference when directed to by an ordinance, statute, or pertinent case law." Exam. R. XV.F.3. No such legal requirements apply today, so we treat agency findings and conclusions like we treat anyone else's: carefully consider them and determine whether, and to what extent, we find them persuasive.

Buildings *(Reserving Clearing/Grading and Critical Areas)*

Tiny House/RV (Reserving Clearing/Grading and Critical Areas)

5. We start with the basics. A "building" is "any structure having a roof." KCC 21A.06.125. And a "structure" is "anything permanently constructed in or on the ground, or over the water; excluding fences six feet or less in height, decks less than 18 inches above grade, paved areas, and structural or non-structural fill." KCC 21A.06.1255. If the tiny house were a building or structure; it would require a building permit; however, it is not permanently constructed in or on the ground. Per the state's interpretation, where the structure has wheels it is not a "tiny house" at all, but likely an RV or park model. Ex. D12 at 002.

6. Neither the parties nor we have identified any category that is a closer fit to what exhibits D5 at 006 and A2 depict than an RV.

RVs include travel trailers, folding camping trailers, and truck campers, but also more substantial things that can be hooked up to utilities, like park trailers and motor homes. KCC 21A.06.960.

7. In its current location the RV is illegal in two respects. First, it appears to have been parked partially on the neighbor's property (the blue line). Ex. D11 at 011 (rotated 90 degrees).

8. Second,

> All vehicle parking and storage for single detached dwellings must be in a garage, carport or on an approved impervious surface. Any impervious surface used for vehicle parking or storage must have direct and unobstructed driveway access.

KCC 21A.18.110.I. We tackle impervious surfaces below, but there is no direct and unobstructed driveway access, only a walking path (depicted above) leading to the driveway. Thus, Local Services has proven a violation.

9. The more interesting question is how Appellants could use the RV if they re-parked it on an approved impervious surface with direct, unobstructed driveway access.

10. Local Services cites its 2020 Regulatory Review Committee (RRC) decision about how long an RV can remain on a property; that is not particularly illuminating, for it focused on RVs in coastal hazards and zero-rise flood fringe areas (not our case) stored on a *vacant* lot (also not our case). Ex. D15. The 2019 RRC notes linked in footnote 3 focused on a yurt (which does not have wheels) on a *vacant* property where the primary use of the property was recreational; that too is not helpful—a yurt is not an RV, and Appellants' property has a legally-established primary use (residential). The 2017 RRC notes also linked in footnote 3 likewise focused on RVs again stored on a *vacant* property. Even assuming all three RRCs correctly answered the questions presented, they shed little light on Appellants' scenario.

11. Still, we were confident at hearing that we had, in previous decisions, definitively answered the precise RVs-housing-people scenario posed here. Yet reviewing those decisions, post-hearing, we discovered that those scenarios all involved either:

- property with no legally-established primary use (such as residential) that an RV could possibly be "accessory" to, or

- property with a legally-established residence but also someone living long-term (i.e., more than 60 days) in an RV on that property.[1]

Sixty days is a magic number, code-wise. It is the marker for when a use in continuous operation becomes established (providing it was legal to begin with). KCC 21.06.1347. It is also the maximum period a permit can authorize a use as "temporary" in any given year. KCC 21A.32.100.A & .120.B.1.[2]

12. If Appellants moved their RV to a legally-established impervious surface, presumably parking it indefinitely would be an allowed accessory use to their primary use of the

[1] Appellants point to a 2010 decision from a previous examiner discussing RVs. Ex. A34. As that discussion does not cite a single code section, we are not sure what that examiner was reasoning from, or why. We do not find it persuasive.
[2] In numerous appeals, past appellants have argued that a structure was "temporary" (and did not require a permit) because it was not "permanent" as one uses that term conversationally and dictionaries define—"existing perpetually; everlasting," or "intended to exist or function for a long, indefinite period," or "long-lasting or nonfading." We have had to bear the bad news to those appellants hoping that, because they had not constructed their structures to stand the test of time, they did not need to obtain a building permit for even those structures sometimes in place for years. Again, an RV is not a "structure."

property as single-family residential.[3] Would the legality change if Appellants' friends and family occasionally stayed in it, but occupancy did not exceed 60 days total use in any given year? Would the Airbnb rental angle alter that analysis, provided occupancy did not exceed 60 days total use in any given year? None of those scenarios seem inconsistent with KCC 21A.06.960's description of an RV as "a vehicle designed primarily for recreational camping, travel *or seasonal use*." And a single RV on a property with a single-family residence is not an "RV park."

13. We do not mean to create false hope or take Appellants down a path that will only prove more frustrating than simply removing the RV. There may be other codes, like fire codes, not discussed at this or past hearings that would render such use otherwise illegal. But we confine our holding today to the RV being illegal because of *where* on the property it is currently located. If Appellants move it to a legally-established impervious surface and a dispute arises as to allowable uses totaling less than sixty days per year, we retain jurisdiction to revisit the issue.[4]

Shed (Reserving Clearing/Grading and Critical Areas)

14. There is no question that the shed is a building. Ex. D5 at 008. The shed sits 11 feet from the property line and thus is not within the 10-foot setback. Exs. A7-A8.

15. Neither legal non-conforming use, nor what the 2008 permit process legalized (discussed below), nor "conversion" of a legal structure into something else, turn out to be relevant. Appellants' approved 2008 plans were to repurpose the old mobile home as a storage shed. However, after part of a tree fell on it and caused extensive damage, Appellants carted it off the property. They later placed the shed well north of the mobile home's footprint. The shed thus has no legal connection to the mobile home. Removing the mobile home, along with adding the shed and other impervious surfaces, plays into the impervious-surface-added-since-2004 discussion below, but not into whether Appellants need a building permit for the shed.

[3] The scenario would change if the RV degraded to inoperative vehicle status. KCC 21A.06.1432 (inoperative definition); KCC 23.10.040.A (inoperative vehicles must be enclosed within a building). But Appellants' RV looks immaculate.

[4] Possibly there is a restriction against parking an RV within *X* feet of a property line, but no one has pointed to that.

16. 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. However, KCC 16.02.240 carves out exceptions; the only arguably pertinent one here being the allowance (emphasis added) for:

> 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.

up to 200 ft.[2]

17. The shed was, at some point, available for sleeping and later for TV watching. Ex. D10 at 022–23. That puts it well outside the building permit-exempt, tool/storage shed category, and well within the accessory living quarter category, defined as "an accessory building for the use of the occupant or persons employed on the premises, or for temporary use by guests of the occupant. Such quarters do not include an area for the preparation or storage of food and are not used as a separate dwelling unit." KCC 21A.06.010. Local Services has proven a violation.

18. In terms of bringing the shed into compliance, we do not recall Local Services' pointing to any part of the *construction* itself as inconsistent with a shed, nor do we see any obvious structural inconsistencies, like a loft that would need to be demolished (to make it a permit-exempt one-story structure) or plumbing fixtures to remove. The unit has power, but power is not inconsistent with a tool/storage shed. There is always a danger that an owner would later convert it back, but Appellants hardly seem the always-pushing-the-line, repeat code enforcement customers we entertain from time to time. *See also* Exs. A35–36. We set compliance terms in the DECISION section below.

Clearing and Grading *(Reserving Critical Areas)*

General Clearing and Grading Framework

19. The code starts from the premise that, unless specifically excepted, a person may not do any clearing or grading without first obtaining a permit. KCC 16.82.050.B. The definition of "grading" is broad, meaning "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. The definition of clearing is even broader, including "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.

20. Thus, 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 some gravel to fill in a walkway's low spots in the winter, would need to affirmatively demonstrate an exemption to the permit requirement.

21. To avoid that absurd result, we have consistently required Local Services to assert and then (if appealed) to prove clearing or grading either in excess of one of the first three numbered threshold exceptions in KCC 16.82.051.C (here, the post-2004 adding over 2,000 ft.² of new or replaced impervious surface, or clearing over 7,000 ft.² being the applicable two) *or* clearing/grading in a location, such as a critical area/buffer, where those three threshold triggers do not apply. If Local Services meets its burden, then the burden shifts to an appellant to show that the clearing or grading fits into one of the other 23 exceptions KCC 16.82.051.C provides (such as hazard tree removal, maintenance of a lawn/landscaping, etc.) to the normal permit requirement.

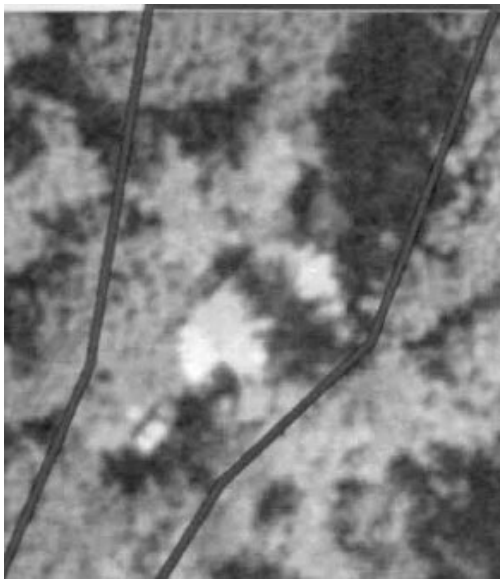
22. In addition, the 7000 ft.² of cumulative clearing exception is problematic, because most sites with a pre-existing home will typically have over 7,000 square feet of "cleared" space. And unlike the 2000 ft.² of impervious surface added after January 1, 2005, exception discussed below, there is no set start date for measuring "cumulative." Does it include pre-Columbian, Native American active land management practices (like frequent, low-intensity, prescribed burns)? Does it peg to the first European taking an axe to wood? As we wrote in a recent decision,

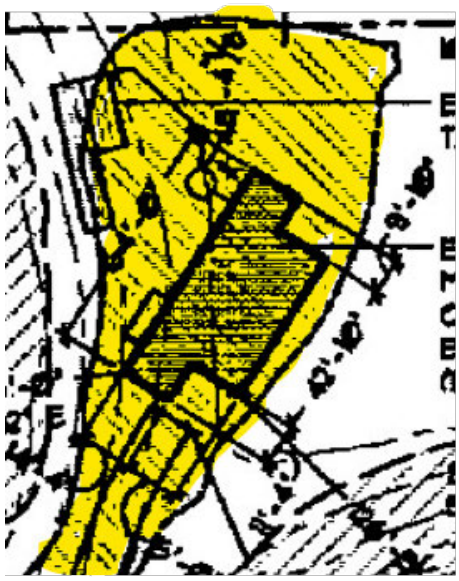
> Unless the code is amended in the interim, the next time Local Services asserts a clearing violation of over 7000 cumulative ft.², where there has not been 7000 ft.² of new activity since the modern grading code/critical areas ordinance went into place at the beginning of 2005, Local Services shall 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 [since the end of 2004] without needing a permit—any new clearing should require a permit.

The latest version of proposed ordinance 2023-0440 adds 7000 ft.² of "cumulative" clearing with "on a single site since January 1, 2005," and that is the baseline we will apply. And 2005 synchs nicely here with the timeline tackled in the next paragraph.

Clearing (Reserving Critical Areas)

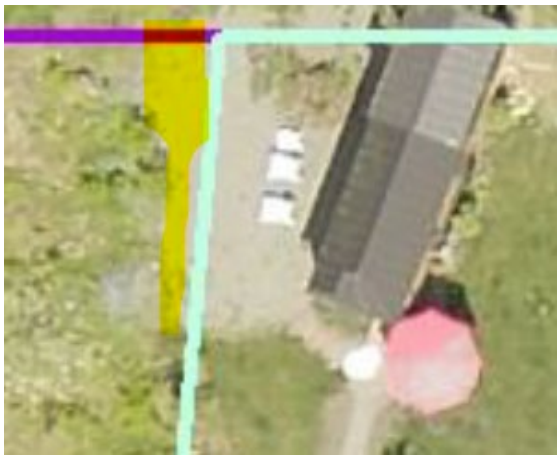
23. In 2005, Appellants applied to enroll a portion of their property in the County's Public benefit rating system, a program that provides beneficial tax treatment to landowners who provide certain open space resources on a portion of their properties. The relevant area Appellants carved out—meaning it was part of the acreage they enrolled the following year—is depicted below, with the mobile home the white spot in the middle. Ex. D11 at 009. As the excluded area resembles a backwards Nevada, we will refer to it as "Nevada" for short. Nevada closely matches the 9560ft.² "existing cleared area" on their 2008 permit plans. Ex. D6 at 006 (our yellow).





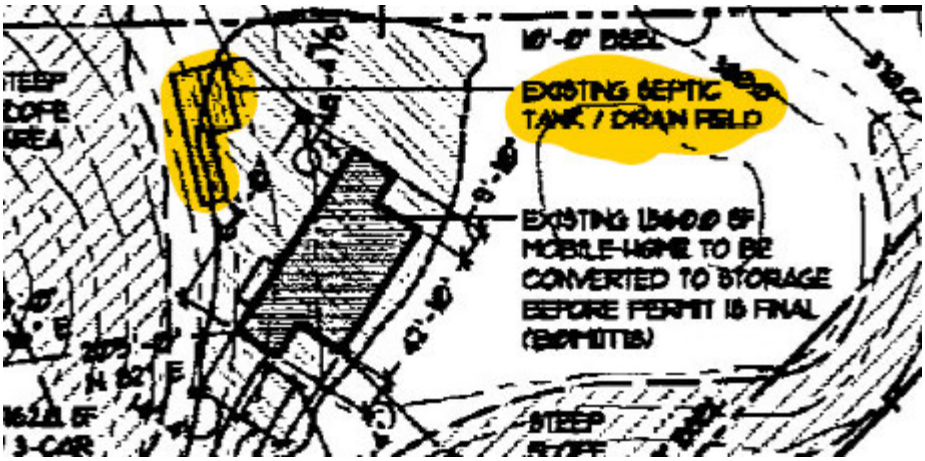
24. The black-and-white photo above shows trees within Nevada that Appellants later removed. However, the 2008 permit legalized Nevada as "cleared," making it part of the legal baseline from which we measure future activities. That remains true even though Appellants did not clear all the cross-hatched (original) yellow-highlighted (our marking) area by 2008; while there is no vested right to other uses *beyond* those disclosed in the 2008 application, it does vest the specific uses disclosed in that application, namely use as cleared space. Ms. Beasley's assessment at hearing—that future activities disclosed in a permit application would likely be legalized, while uses beyond what was in the original plan require a new application—is an impressively accurate restatement of the caselaw.[5]

25. West of Nevada there is additional clearing beyond what the 2008 permit legalized. Ex. D11 at 011 (our yellowed area).



[5] *See Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 283-85, 943 P.2d 1378, 1386-87 (1997) (an application does not vest all uses that *could* have been asked for at the time the application was submitted, but it does vest the specific uses disclosed in that application).

26. Appellants' assertion that their clearing was in the existing septic/drainfield area is borne out by exhibit D6 at 006 (our highlight).



And KCC 21A.24.045.C explicitly allows maintenance (or repair) of OSS systems, even in steep slope/wetland buffers, and drainfields *must* be kept clear of deep-rooted plants. Below we find a *grading* violation in the RV area, but we do not find a separate *clearing* violation in the RV area.

27. Moving south within Nevada, as discussed below in relation to grading, the driveway/parking/former mobile home area is a legally nonconforming footprint. Trimming back vegetation from that area qualifies as exempt, routine maintenance. KCC 16.82.051.C.13; Ex. A4.

28. Conversely, the trapezoid area *east* of Nevada—where Appellants constructed their patio/hot tub/fire pit/gazebo—qualifies as new clearing, absent an affirmative demonstration that some other exception applies; Appellants made no such affirmative demonstration within the trapezoid. Local Services measured that area at 0.12 acres, or 5227 ft.^{2} Ex. D11 at 011.

29. Appellants assert that some of the vegetation they cleared post-2008 were hazardous trees. Local Services' bulletin on hazardous trees notes that in most instances a qualified professional is required to evaluate a tree in determining whether a tree is hazardous. Ex. D16 at 002. In certain locations—like steep slopes/wetlands or their buffers (or in channel migration; landslide hazard and buffer; aquatic area and buffer; and wildlife area and buffer)—clearing even a tree that everyone *agrees* is hazardous does *not* exempt the property owner from needing to obtain a clearing permit. KCC 16.82.051.B & C.25. If the bulletin's authors simply meant that where past activity required (or future activity would require) a clearing permit, then Local Services will need an arborist's assessment on whether a given tree qualifies as hazardous, that may be a reasonable ask of a permit applicant. But the bulletin cannot itself trigger a permit application, where the code does not require one. In an enforcement action, an arborist report could help a property owner meet their burden of showing that each tree qualified as "hazardous" and thus fell within KCC 16.82.051.B's exception, just like taking and keeping photographs of the "before" and "after" could. But that is an evidentiary question, not a legal requirement. It would be *safer* for someone to seek Local Services' approval upfront, to avoid later having to prove hazardous-ness during an enforcement case. But the lack of an arborist report does not, by itself, create a violation.

30. Appellants assert that they removed what they deemed hazardous trees from the following areas. Ex. A13 (circles).

31. The hazardousness of the trees Appellants point to winds up not being relevant. The green-, red-, orange-, and blue-circled trees are within the legally-cleared Nevada; that clearing was exempt even if those trees were *not* hazardous. And, as addressed below, the purple- and white-circle trees were in a steep slope hazard buffer, where cutting even an indisputably hazardous trees still requires a permit. KCC 16.82.051.B.

32. In general, and outside of critical areas or their buffers, clearing of up to a cumulative 7000 ft.^{2} since 2004 is exempt from permit requirements. KCC 16.82.051.C.3. So, have Appellants cleared more than 7000 ft.^{2} *beyond* the legally-cleared Nevada, such the (even

if no critical area buffers were touched) they trigger the need for a clearing permit? There is no one definitive exhibit. The 13,684 ft.² Local Services calculated as cleared inaccurately includes Nevada, a footprint the 2008 permit legalized as "cleared." Ex. D9 at 005.

33. That leaves Local Services' 5227 ft.² estimate for the trapezoid area east of Nevada, an area not covered by the 2008 permit, as the most definitive assessment. Ex. D11 at 011.

34. Even adding in the white- and purple circled trees (imaged below paragraph 30)—which appear to be just outside the trapezoid—Local Services has not quite shown 7000 ft.² of new clearing. KCC 16.82.051.C.3. We return further below to clearing in the context of critical area buffers, but we find no stand-alone clearing violation in terms of square footage.

35. Additionally, Local Services asserts that Appellants' activities breached their current use agreement. Ex. D1 at 002; Ex. D11. Alleged breaches of such agreements are enforced by a different County agency—the Department of Natural Resources (DNRP)—applying a different standard. KCC 20.36.190.I. Code violations and agreement breaches

are not the same. For example, placing an under-200ft.² storage shed outside a critical area buffer/building setback line but within a protected open space area would not violate the code but might breach the agreement, while a logging operation might be consistent with a DNRP-approved forest stewardship plan but might violate the code (absent a permit application). Moreover, appeals of DNRP decisions removing all or a portion of land from current use classification or downwardly adjusting the credit are appealable, but to the Board of Appeals and Equalization, not to the examiner. We are simply not the tribunal to decide such disputes. KCC 20.36.130.B.

36. Because we find below that Appellants' work in critical area buffers will require a clearing and grading permit, when Local Services' reviews Appellants' submittals it should coordinate with DNRP to ensure that either Appellants are still in compliance with the agreement or that whatever remedy Local Services and Appellants put in place to remedy the code violations satisfactorily address open space issues. But today we decide only alleged *code* violations, not alleged *agreement* breaches.

Grading (Reserving Critical Areas)

37. We tackle critical areas below, but in general, outside of critical areas or their buffers,

> Grading that produces less than two thousand square feet of new impervious surface on a single site added after January 1, 2005, or that produces less than two thousand square feet of replaced impervious surface or less than two thousand square feet of new plus replaced impervious surface after October 30, 2008. For purposes of this subsection C.2., "new impervious surface" and "replaced impervious surface" are defined in K.C.C. 9.04.020,

does not require a permit. KCC 16.82.051.C.2.

38. At hearing, Local Services pointed to KCC 21A.06.625 as the applicable definition of "impervious surface." That is incorrect. KCC 16.82.051.C.2 explicitly tells us to look to KCC 9.04.020. And KCC 9.04.020.Z defines "impervious surface" as:

> a hard surface area that either 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. Common impervious surfaces include, but are not limited to, roofs, walkways, patios, driveways, parking lots, storage areas, areas that are paved, graveled, or made of packed or oiled earthen materials or other surfaces that similarly impede the natural infiltration of surface water or stormwater. For purposes of applying the impervious surface thresholds in this chapter, permeable pavement, vegetated roofs, and underdrained pervious surfaces are considered "impervious surface," while an open uncovered flow control or water quality facility is not.

39. Similarly, KCC 9.04.020.KK defines "new impervious surface" as "the creation of impervious surface or the addition of a more compacted surface such as the paving of existing dirt or gravel." Thus, KCC 21A.06.625 is not relevant to our analysis.[6]

40. Much of what Appellants placed was pea gravel. Appellants point to a document DNRP uses to calculate surface water management fees, entitled "Measuring Impervious Surface." It states:

> Landscape rock (pea gravel or round washed rock) that deforms when walked on or driven on is not considered impervious unless it is underlain by an impervious surface (such as compacted dirt, plastic, concrete, etc.).

Ex. A31 at 001. Mr. Holcomb's counter—that surface water management standards do not control but instead we should look to the county code—was undercut by his referencing the wrong County code (KCC 21A.06.625) when, as quoted above, KCC 16.82.051.C.2 explicitly points us to KCC 9.04.020's definitions. That is especially true because, while Mr. Holcomb based his opinion on KCC 21A.06.625, the County authors of "Measuring Impervious Surface" quoted the correct code (for KCC 16.82.051.C.2 purposes) and then tried to apply that standard.[7]

41. In contrast to Appellants' and Mr. Holcomb's competing, all-or-nothing approach to pea gravel, Ms. Beasley offered a more sensible and nuanced approach: placing pea gravel as merely landscaping might not always qualify as adding new impervious surface but placing it in an area that is then compacted by foot or car traffic would. That echoes the position DNRP articulated; in the sentence immediately preceding the pea gravel quote, the authors wrote, "Dirt (i.e., bare soil) compacted more than the surrounding native soil is considered impervious." We find Ms. Beasley's reasoning persuasive.

42. Thus, for example, using pea gravel in the manner pictured below (clipped from the web) as landscaping between the plants and art installations and *not* as a walkway or trafficked area itself, would likely not be construed as adding (a new) impervious surface.

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[6] If we gleaned a substantive difference between KCC 21A.06.625 and KCC 9.04.020.Z & .KK that would change the outcome here in Appellants' favor, we might apply some version of the "invited error" doctrine and hold Local Services to the definition it pressed at hearing. But we see no distinction making a substantive difference to today's discussion. KCC 21A.06.625 defines "impervious surface" as:

> A nonvertical surface artificially covered or hardened so as to prevent or impede the percolation of water into the soil mantle at natural infiltration rates including, but not limited to, roofs, swimming pools and areas that are paved, graveled or made of packed or oiled earthen materials such as roads, walkways or parking areas. "Impervious surface" does not include landscaping and surface water flow control and water quality treatment facilities.

[7] KCC 9.04.020. We did not trace the statutory history back to see if at one point subsection .Z of KCC 9.04.020 was once subsection .P, but .Z is the current numbering.

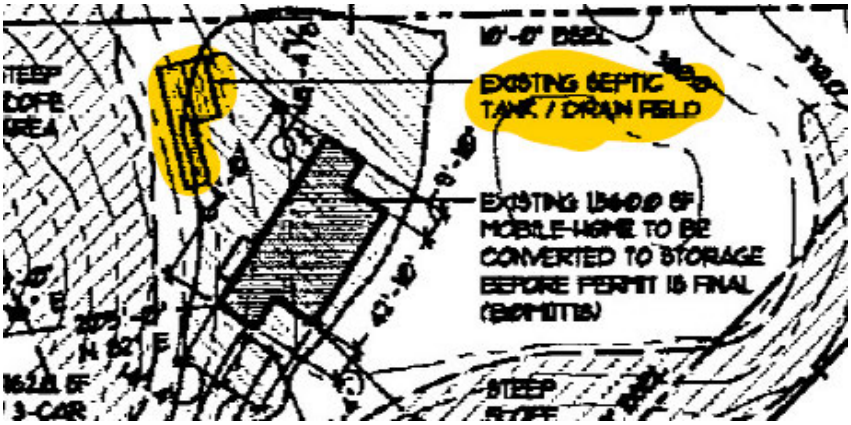
43. That distinction might slightly reduce the square footage of "new impervious surface" Appellants added, in that placing pea gravel in areas *not* part of "walkways, patios, [or] driveways" arguably does not create an "impervious surface." However, much of what Appellants places was used for new trafficked areas—which are explicitly "impervious," per KCC 9.04.020.Z's explanation that walkways, patios, and packed earth qualify as impervious surfaces.

44. West of the RV, we see a roofed patio, which is definitely an impervious surface. Ex. A6.

45. Even without the roof, the patio area would explicitly still qualify as a new impervious surface. Ex. D5 at 005. And the patio (and impervious surface) extends west beyond the pergola (the area with the blue chairs) and towards the western steep slope and western wetland.

46. It is not clear if or how far north (towards the picture taker in the below photo) the impervious surface extends, but the area appears to be set up for walking and may qualify as impervious surface as well, though that is less clear than for walkway or patio areas. Ex. D5 at 006.

47. In addition, part of the patio appears to be over the drainfield, which seems to run counter to Public Health—Seattle & King County's requirements to keep drainfields clear of patios or sandboxes.[8] Ex. D6 at 006 (our yellow).



As with DNRP on open space issues, when Local Services' reviews Appellants' submittals it should coordinate with Public Health to ensure that whatever remedy Local Services and Appellants put in place to remedy the RV area is consistent with onsite septic drainfield requirements; for example, not replanting the graveled area with deep-rooted vegetation.

[8] https://kingcounty.gov/en/dept/dph/health-safety/environmental-health/on-site-sewage-systems/maintaining-your-system.

48. Moving east of the RV area, the shed, the gazebo, the graveled fire pit, and the deck/hot tub area are all new impervious surfaces, retarding the entry of water into the soil mantle versus natural conditions. Ex. D10 at 008, 010.

49. Moving south, the walkway to the RV (imaged below paragraph 7) is impervious. However, the driveway/parking/former mobile home area is different. Appellants testified that they added pea gravel on top of the pre-existing driveway/parking area/former mobile home footprint. That meshes with the photographs. Ex. A25 (pea gravel is the smaller-grained material to the right).

50. We find persuasive Appellants' testimony that they stayed within the pre-existing driveway/parking area/former mobile home footprint. Exhibit D10 at 011 shows a discernible breakpoint/elevation change between the parking area and the non-impervious upslope (save for the added gravel/stone walkway heading to the RV). And Local Services does not allege that Appellants recently bladed or recontoured their property.

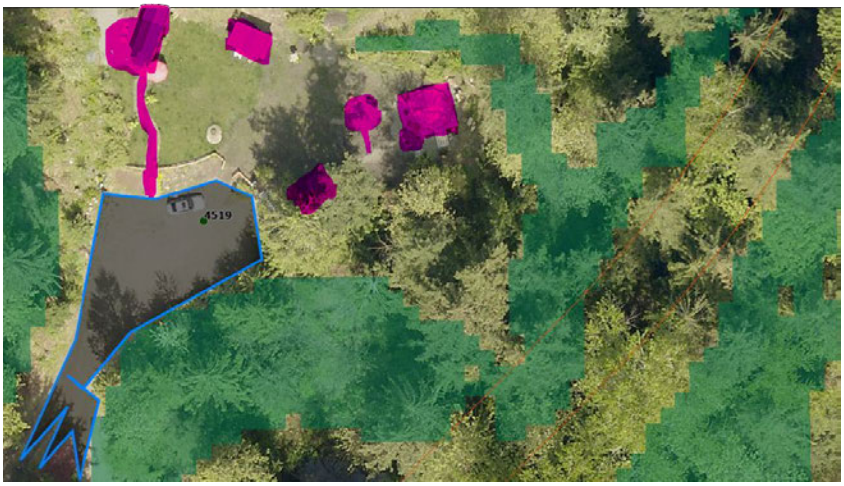
51. That Appellants added gravel within a historically impervious footprint does *not* mean that the footprint had not, at some intervening point, lost its legal nonconforming status, such that adding pea gravel (or anything else) would no longer qualify as permit-exempt "routine maintenance." KCC 16.82.051.C.13.[9] As exhibit 26 shows, there is some grass growing up, and the hedges will forever try to expand, but we find that the pre-existing driveway/parking area has not lost its legal nonconforming status. The pea gravel added within that driveway/parking area footprint area qualifies as exempt "maintenance." KCC 16.82.051.C.13.

52. So, momentarily setting aside steep slope/wetland buffer areas (within which there is no square foot quantum where adding an impervious surface does not require a permit), where does that leave us? Has Local Services shown more than 2000 ft.^{2} of impervious surface added since 2004 and not legalized by their 2008 permit, triggering the need for a clearing permit? KCC 16.82.051.C.2.

[9] We recall one appeal involving an owner who had recently graveled a large swath of their property. The owner argued that they had a legal nonconforming impervious footprint because they had graveled most of the property in the 1980s. They demonstrated that by videoing themselves digging a test hole, just outside the footprint of their recent work (and thus presumably representative of the immediately-prior condition of the areas they had recently re-graveled). They exposed many inches of pre-exiting gravel…but only after cutting away knee-high, established vegetation, including horsetails (a water-loving species) to get to the gravel. As that impervious footprint had long ago lost its legal nonconforming status, their recent re-gravelling efforts were not exempt maintenance and needed a grading permit.

53. Unless we are misreading the exhibits, the only impervious square footage estimate Local Services has offered is 3874 ft.² Ex. D9 at 003.

54. However, that estimate is not useful. It is drastically *over*inclusive, in that, as discussed above, the driveway/parking/former mobile home area is a legally-impervious footprint in which Appellants have, since 2004, only performed permit-exempt routine maintenance; none of the 3874 ft.²-area outlined in blue qualifies as new impervious surface. And it is drastically *underinclusive*, in that it ignores all the impervious surfaces Appellants have recently added north of that—the gravel walkway to the RV, the RV itself, the RV patio, the shed, the deck/hot tub, the fire pit, and (although it appears to be hiding in the trees and thus our bottom-most fuchsia-highlighted rectangle is an approximation) the gazebo. Ex. D9 at 003.



55. Our sloppy highlighting aside, do those fuchsia areas add up to 2000 ft.²? Possibly, but ultimately Local Services bears the burden of proof. Moreover, as we have explained in numerous decisions—usually in rejecting an appellant's claim that because they had an existing surface that *already* retarded water entry (as contrasted with ground in its natural condition) and thus was "impervious" before they worked it, their recent addition of a *more* impervious surface, such as roofing over a gravel area, should not count as creating

"new impervious surface"—"impervious" is not a binary, yes/no. One impervious surface can be more impervious than another impervious surface.

56. Yet here that same principal cuts in the *opposite* direction. Appellants removed the mobile home, an impervious area they estimated at 1600 ft.² Ex. D3 at 002. They extended the gravel parking area into some of the mobile home's footprint; however, gravel is a less "compacted surface" than the roof. In addition, the aerial backs up Appellant's testimony that they amended the soil and converted a portion of the mobile home footprint to a lawn, swapping in *pervious* for imperious area and thus decreasing the impervious-surface-added-since-2004 total for the property. Ex. A13 (our fuchsia). Some of the mobile home footprint needs to be subtracted from the new-or-replaced-impervious-surfaces-added-since-2004 calculation.

57. Momentarily setting aside critical areas, Local Services has not shown that more than 2000 ft.² of new or replaced impervious surfaces have been added since 2004. KCC 16.82.051.C.2.

Critical Areas and their Buffers

General Critical Areas Framework

58. Local Services bears the initial burden to assert, and then (if appealed) to prove, activity within a critical area or buffer. If Local Services meets it obligation, then the burden shifts to an appellant to show that such activity was legal without a permit.

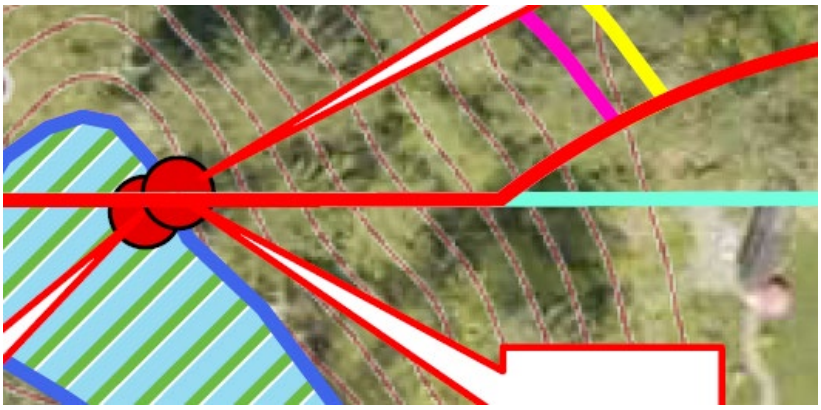
59. At hearing, Local Services seemed to argue essentially that Appellants should apply for permits to *see* if there were critical areas/buffers that had been violated. If we captured that point correctly, we do not adopt it. In an appeal of a code enforcement order where Local Services has asserted that *X* occurred in *Y* critical area/buffer and thus violated the critical areas code, Local Services has the burden of showing that *Y* is, more likely than not, a critical area or its buffer. A future, site-specific critical areas study might provide more definitive, and perhaps contrary, information. But we apply a preponderance-of-

the-evidence test, based on the testimony and exhibits in our record, to determine whether there has been a critical areas code violation necessitating a permit application.

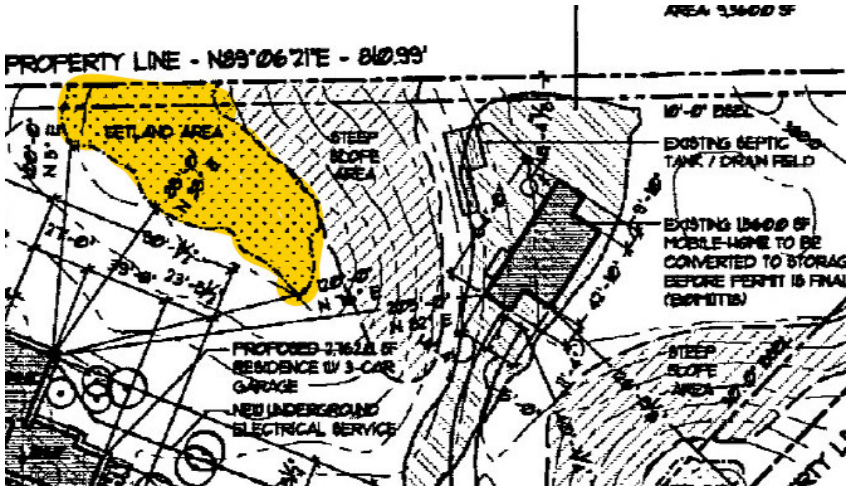
60. We now turn to the four identified critical areas—a wetland and steep slope west of the above-described activity and a wetland and a steep slope east of the above-described activity.[10] In doing so, we look at all activities (construction, clearing, and grading) for that particular critical area buffer.

Western Wetland

61. Earlier this year, Local Services completed a critical areas designation for the neighbor to the north. Ex. D7. It delineated a category III wetland that straddles the neighbor's and Appellants' properties, as well as a steep slope rising towards the RV area. Ex. D7 at 013.



62. That designation is legally binding only for the neighbor's property, but it is evidence of where those buffers extend onto Appellants' property. Moreover, looking at Appellants' 2008 site plan, the wetland's contours appear to have remained constant over the last 16 years. Ex. D6 at 006 (our yellow).



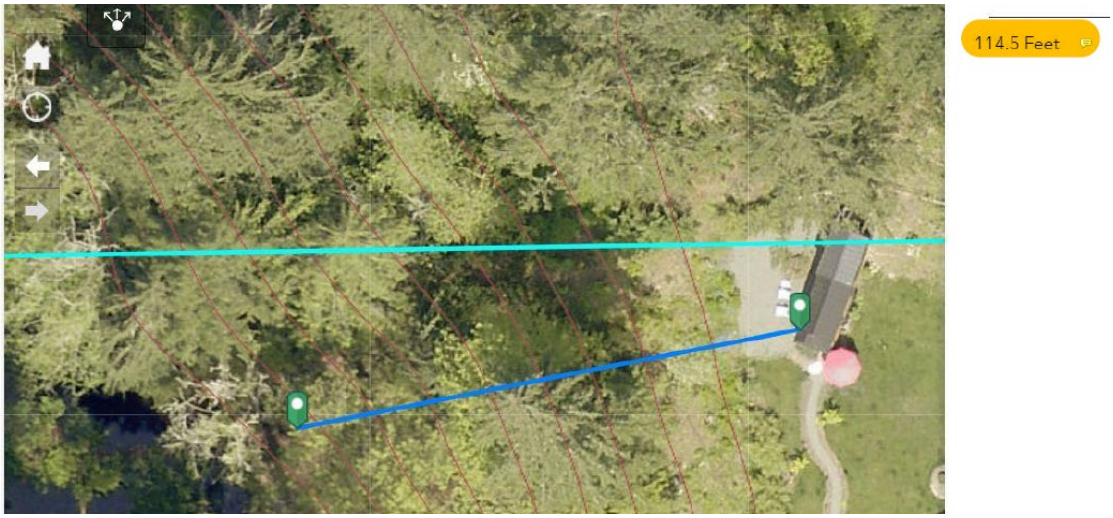
[10] The locus of Appellants' activity and Local Services' enforcement is the eastern third of Appellants' property. So, when we say the "western wetland" and "western steep slope," we mean "in the western part of the inquiry area," even though the western wetland is in the *eastern* half of the parcel.

63. That gives us confidence that wetland boundaries are, more likely than not, where the detailed 2024 critical areas study found them to be.

64. Instead, what has changed is the rating system and scoring, which has increased that wetland's *buffer* width to 110 feet. Appellants circa-2008 critical areas designation only locked in the existence, location, classification, and buffers for five years (*i.e.*, until about 2013). KCC 21A.24.500.E.1. It did not inoculate Appellants from later zoning code changes. And while cleared/graded areas or structures mapped out in the 2008 permit process would remain legal—which cut in Appellants' favor in the previous clearing analysis—there is no vested right to other uses (or areas) beyond those disclosed in the 2008 application.

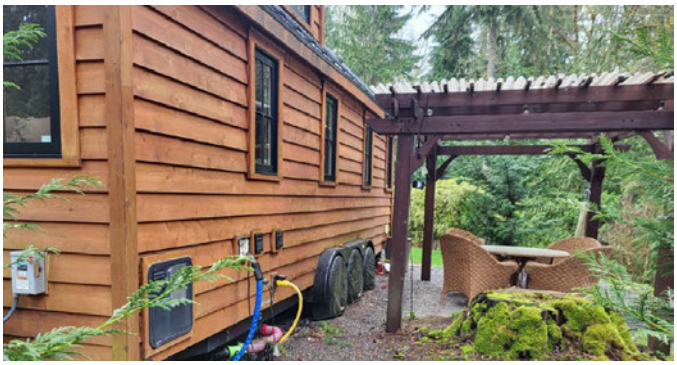
65. Appellants work in the area under and around the RV was outside the wetland buffer as it existed circa 2008. Appellants were understandably unaware that, due to regulatory changes, their property was now encumbered by an expanded wetland buffer. However, the concept that "ignorance of the law is no excuse" goes back several millennia. Leviticus 5:17. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 581 (2010), for our Court's modern restatement. And while there is some flexibility in compliance requirements where an appellant "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," KCC 23.02.130.B, that is inapplicable where Appellants undertook (or had someone undertake) an action and simply did not understand the legal implications of that action.

66. The increased wetland buffer turns out not to matter to the RV itself. Local Services' mapping shows the corner of the RV about 114.5 feet from the edge of the offsite wetlands. That puts the RV itself several feet outside the 110-foot wetland buffer. And while one must "set buildings and other structures back a distance of fifteen feet from the edges of all critical area buffers," KCC 21A.24.200, as analyzed above an RV is not a structure. Ex. D9 at 004.



67. However, the pergola on the west (wetland) side of the RV (which does not appear on the above aerial photo but is shown in later aerial photos) is a "structure" ("anything

permanently constructed in or on the ground, or over the water; excluding fences six feet or less in height, decks less than 18 inches above grade, paved areas, and structural or non-structural fill"). To be precise, it is a "building" ("any structure having a roof"). KCC 21A.06.1255, 21A.06.125; Ex. D5 at 006 & Ex. D10 at 001.



68. Using Local Services' 114.5 foot estimate (the dark blue line below)—which seems a reasonable extrapolation from the fuchsia 110-foot wetland buffer and yellow 15-foot building set back line from the 2024 wetland delineation—and comparing it to the aerial taken after the pergola was installed, the pergola was constructed partially within the wetland boundary itself and entirely within the additional 15-foot building set back line. Exs. D9 at 004 (imaged below paragraph 66); Ex. D7 at 013 (imaged below paragraph 61); Ex. D9 at 007.

69. Even without the pergola, much of the graveled areas west of the RV qualifies as adding "new impervious surface" within the 110-foot wetland buffer. Moreover, "grading" includes not only what we commonly mean when we discuss the concept—"excavating" and "filling"—but also "land disturbing activity," defined as "an activity that results in a change in the existing soil cover, both vegetative and nonvegetative." KCC 16.82.020.O & Q. So even if, per the above discussion, the pea graveled areas not part of the walkway or patio do not qualify as "new impervious surface," depositing that gravel over whatever vegetative and nonvegetative surface was previously there was also "grading." And that was a violation; the "Grading" cell under "Wetland and Buffer" is blank, and "clearing and grading permits are required when a cell in this table is empty." KCC 16.82.051.B.

70. Moving south, as noted above, the gravel Appellants added in the pre-existing driveway/parking/former mobile home area was routine maintenance of a legal nonconforming impervious area, which is permit-exempt even within a wetland buffer. KCC 16.82.051.C.13.

Western Steep Slope

71. A steep slope climbs up from the western wetland. Appellants calculated the edge of the RV to be 43 feet away. Ex. A4.

72. The analysis here largely repeats the western wetland buffer analysis, although there may be a slight difference. Per the above aerial, it appears the steep slope buffer extends *farther* than the wetland below the blue line, but the steep slope buffer is encompassed *within* the wetland buffer above the blue line. As with the wetland buffer:

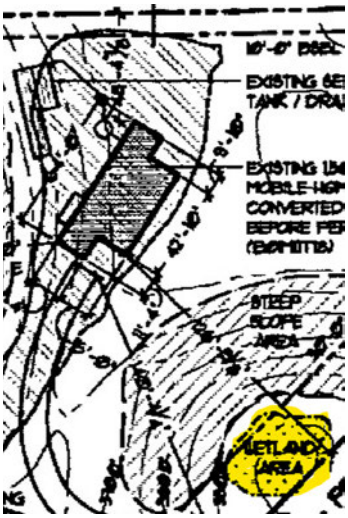
- The RV is not a structure, but the pergola is, and it too was constructed partially within the steep slope boundary itself and (almost) entirely within the additional 15-foot building set back line.

- Even without the pergola, much of the graveled areas west of the RV qualifies as adding "new impervious surface" within the 50-foot steep slope buffer. And even for pea graveled areas not qualifying as "new impervious surface," depositing that gravel over whatever vegetative and nonvegetative surface activities was previously there was also "land disturbing activity." And the "Grading" cell under "Steep Slope Hazard and Buffer" is blank, meaning a permit was required. KCC 16.82.051.B.

- Gravel Appellants added to the pre-existing driveway/parking/former mobile home area was routine maintenance of a legalized impervious surface. Even if some of the maintenance within that footprint was also within the steep slope buffer, it was still permit-exempt. KCC 16.82.051.C.13.

Eastern Wetland

73. As identified during Appellants' 2008 project, their property also contains a wetland along its eastern border. Ex. D6 at 006 (our yellow). The neighbors' 2024 critical area designation depicted this as an "unrated" wetland. Ex. D7 at 013.

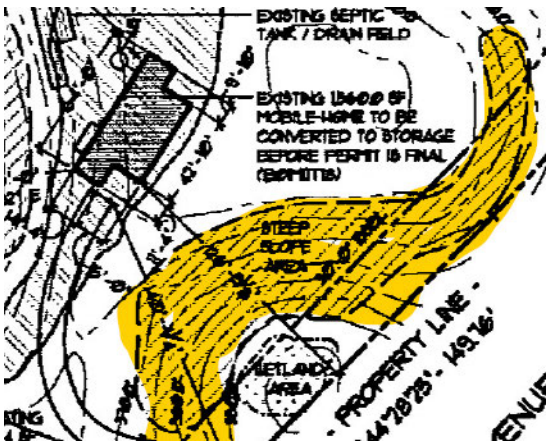


74. Mr. Holcomb's assessment that the eastern wetland is likely a depressional wetland is persuasive. Local Services did not offer an assessment of what category it might be, which is understandable given the limited information. Even assuming it is also a category III wetland, the buffer could be as low as 40 feet for low-impact uses. KCC 21A.24.325.A.1.

75. The eastern wetland buffer is probably irrelevant because the abutting steep slope rising from that wetland has its own buffer, one that very likely extends farther upland than that wetland's buffer. In any event, Local Services has not shown any non-exempt activity specifically related to the eastern wetland's buffer.

Eastern Steep Slope

76. The one steep slope area Appellant disputes is an "arm" allegedly running east to west towards the shed at the northern top of the eastern steep slope. In his testimony, Appellant explained that the slope (the dark green below) ends at approximately our red *X* (below). Appellants' testimony is consistent with the 2008 site-specific map—meaning a map that was the product of actual, boots-on-the-ground review versus countywide aerial mapping. The 2008 map shows a steep slope swoop wrapping around the eastern wetland and heading north to the northern edge of Appellants' property, but *without* an arm jutting out due east from the northern tip of that steep slope. *Compare* Ex. D7 at 008 (our red *X*) *with* D6 at 006 (our yellow).



77. And unlike wetlands, no one pointed to any post-2008 regulatory amendments related to steep slopes and their buffers; the testimony was the opposite. Moreover, although we cannot find it in the code, Mr. Holcomb indicate something about the standard 50-foot buffer applying only where a slope is at least 20 feet high. Thus, we find that the eastern steep slope, or at least the portion that has a 50-foot buffer, only extends to that red *X*. That puts the shed well beyond 65 feet from the edge of the steep slope, meaning it is outside the 50-foot buffer and the additional 15-foot building setback line tacked onto that buffer.

78. Conversely, and moving south and east, Local Services' blue line measures 65 feet from the edge of the steep slope. Ex. D9 at 003 (described below).

79. From that we find that:

A. The deck and hot tub area (our fuchsia square) adds impervious surface within the 50-foot buffer to the steep slope; that is a violation. (Again, we are not applying a 50-foot buffer to the steep slope "arm" allegedly running west for our red *X*, so we mean within 50 feet of the steep slope *east* of the deck/hot tub.)

B. The gazebo is likely within the 50-foot steep slope buffer to the *south*, but as we cannot identify it precisely under the canopy, our fuchsia square is only an approximation; closer review may disprove that. We are more confident in finding the gazebo within the 15-foot building setback of that 50-foot steep slope buffer to the south, which is by itself a violation.

C. Impervious ground surfaces like patios are not allowed in the buffer itself but are generally allowed with the building setback. KCC 21A.24.200. So, even though the fire pit is less than 65 feet west of the steep slope, it appears to be just outside the 50-foot buffer and thus is *not* a violation.

D. Any clearing, even of hazardous trees, within the 50-foot buffer, required a permit. Appellants have done at least some clearing within 50 feet of the steep slope buffer, likely including the white- and purple-circled trees Appellants

depicted in the image below paragraph 30 that we attempted to superimpose above.[11]

DECISION:

1. The RV is parked partially over the property line and in a wetland and steep slope buffer, is not parked on an approved impervious surface, and does not have the required direct and unobstructed driveway access. By **February 14, 2025**, Appellants must either remove the RV from the property or wheel it to a previously-legalized impervious area. We make no findings on what uses totaling sixty days or less per calendar year would be legal in a legal location. We retain jurisdiction to reopen the case should the parties later come to loggerheads on the use issue.

2. The shed at the northern edge of the property is not a permit-exempt tool/storage shed, and thus is a violation, but there are no related critical areas violations. Appellants can achieve compliance by submitting to Local Services, by **March 14, 2025**, either:

    A. A complete prescreening meeting request (which they can combine with their clearing/grading request) to permit the shed as an accessory living quarter or something else, and thereafter see the permit process to completion; OR

    B. Photographs showing that the shed now qualifies as a permit-exempt tool/storage shed.

3. As to clearing, grading, and critical areas:

    A. Appellants have not cleared more than 7000 ft.² outside the area legalized as cleared by the 2008 permit, and we find no clearing violation related to the western wetland, western steep slope, or eastern wetland. However, some of their clearing was within the eastern steep slope buffer, which triggered the need for a clearing permit regardless of whether any (or all) of what they cleared were hazardous trees.

    B. Appellants have not added more than 2000 ft.² of new impervious surface since 2004. However, within the buffer to the western wetland and western steep slope they added impervious surfaces and a structure (the pergola), in addition to other land disturbing activity, all triggering the need for a grading permit. And within the eastern steep slope buffer they added impervious surfaces (a deck and likely a gazebo, but not the fire pit), and placed a structure (the gazebo) within the building setback line, also triggering the need for a grading permit.

    C. By **March 14, 2025**, Appellants must submit a complete clearing/grading prescreening meeting request to Local Services and thereafter see the permit process to completion. As it reviews the permit application, Local Services should

[11] KCC 16.82.051.B. Exs. A13, A19. Moreover, as the gazebo and hot tub/deck area were illegally placed, it is difficult to see how one would have a right to cut trees threatening a structure that should not have been there in the first place.

coordinate with DNRP on open space issues and Public Health on drainfield issues.

4. No penalties shall be assessed against Yuki Ito and Arie van der Hoeven 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 November 14, 2024.

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 AUGUST 5, 2024, HEARING IN THE APPEAL OF YUKI ITO AND ARIE VAN DER HOEVEN, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR240087

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Ben Hossienzadeh, Christopher Holcomb, Camille Beasley, and Arie van der Hoeven. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

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

Exhibit no. D1	Department of Local Services staff report
Exhibit no. D2	Copy of Notice & Order issued April 11, 2024
Exhibit no. D3	Copy of Appeal received May 6, 2024
Exhibit no. D4	List of Codes cited in the Notice and Order
Exhibit no. D5	Pictures
Exhibit no. D6	Critical areas designation/Notice on title
Exhibit no. D7	Critical area designation 2024 for adjacent property – 28623 NE 47th pl Redmond WA 98053 - review includes subject property.
Exhibit no. D8	Sensitive area on title provided 2019 to van der Hoevens.
Exhibit no. D9	Critical areas aerials and before and after aerials
Exhibit no. D10	Airbnb website information
Exhibit no. D11	2006 Open space agreement and subsequent violation
Exhibit no. D12	Labor and Industries code on "tiny homes"
Exhibit no. D13	Initial letter issued to van der Hoevens.
Exhibit no. D14	Critical area assessment of subject property.
Exhibit no. D15	2020 Regulatory Review Committee Minutes
Exhibit no. D16	Tree Removal Information and Application Checklist
Exhibit no. D17	Wetland rating system and step slop hazard buffer evolution
Exhibit no. D18	Ordinance 16985, dated November 30, 2010

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

Exhibit no. A1	Photograph
Exhibit no. A2	Photograph
Exhibit no. A3	Photograph
Exhibit no. A4	Photograph and notes
Exhibit no. A5	Photograph - shed interior
Exhibit no. A6	Photograph - AirBnB listing view
Exhibit no. A7	Photograph - shed distance to property line
Exhibit no. A8	Photograph - shed distance to property line
Exhibit no. A9-A11	Aerials
Exhibit no. A12	Site map - King County project number B08Q0054, March 17, 2008
Exhibit no. A13	Marked aerial - where dangerous trees were cut or trimmed
Exhibit no. A14	Photograph - Laurel bushes which the edge the of the driveway and parking area since 1985

Exhibit no. A15	Photograph - Laurel bushes which the edge the of the driveway and parking area since 1985
Exhibit no. A16	Photograph - Dangerous trees removed
Exhibit no. A17	Photograph - Dangerous trees removed
Exhibit no. A18	Photograph - Hard to see in photo but a large maple branch pierced the roof of the shed
Exhibit no. A19	Photograph - Maple trimmed
Exhibit no. A20	Photograph - example of cutting a hazardous tree while preserving a healthy one
Exhibit no. A21	Photograph - Big maple tree next to our old house, we the appellants couldn't park cars near it due to branch fall danger
Exhibit no. A22	Photograph - Big maple tree next to our old house, we the appellants couldn't park cars near it due to branch fall danger
Exhibit no. A23	Photograph - Green circle maple tree: circumference of 12-13 feet
Exhibit no. A24	Photograph - Green circle maple tree: circumference of 12-13 feet
Exhibit no. A25	Photograph - Pea gravel
Exhibit no. A26	Photograph - We cut or/and trimmed hazardous trees that would fall or had fallen on the old house. Therefore, exemption should be applied.
Exhibit no. A27-28	Aerials
Exhibit no. A29	Aerial - wide property view for discussion purposes
Exhibit no. A30	2005 Critical Areas Designation performed by King County
Exhibit no. A31	Measuring-impervious-surface King County
Exhibit no. A32	Stewardship Plan E05CT085B_vanderHoeven_Ito
Exhibit no. A33	ENFR210205 (SWO) (NOV) Report and Decision
Exhibit no. A34	E0600711 Report and Decision
Exhibit no. A35	Sightline article on Initiative 933, dated November 13, 2006
Exhibit no. A36	Seattle Times article on Initiative 933, dated November 13, 2006
Exhibit no. A37	Appellants response, August 8, 2024, email

November 14, 2024

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR240087**

YUKI ITO AND ARIE VAN DER HOEVEN
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, 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 November 14, 2024.

Lauren Olson

Lauren Olson
Legislative Secretary

Beasley, Camille
Department of Local Services

Campbell, Thomas
Department of Local Services

Fairbanks, John
Department of Local Services

Holcomb, Christopher
Department of Local Services

Hossienzadeh, Ben
Department of Local Services

van der Hoeven, Arie/Yuki
Hardcopy

Whalen, LaDonna
Department of Local Services