July 25, 2017

OFFICE OF THE HEARING EXAMINER
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REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR160531**

SANDRA VOGL AND BOB HANNAH
Code Enforcement Appeal

Location: 14803 239th Place SE, Issaquah

Appellants: **Sandra Vogl and Bob Hannah**
PO Box 2408
Issaquah, WA 98027
Telephone: (206) 679-1002
Email: paraskr@aol.com

King County: Department of Permitting and Environmental Review
represented by **Holly Sawin**
35030 SE Douglas Street Suite 210
Snoqualmie, WA 98065
Telephone: (206) 477-0291
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	July 18, 2017
Hearing Record Closed:	July 19, 2017

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

FINDINGS:

Background

1. Sandra Vogl is the record owner of Parcel no. 2223069003, the address of which is 14803 239th Place SE, Issaquah in the RA-5 zone in unincorporated King County (Property). Bob Hannah is a tenant on the Property. Exhibits 1 and 3.

2. Based on a complaint, Officer Holly Sawin conducted a site visit of the Property on July 21, 2016, observing two cargo containers modified with windows and doors; a circular driveway; two 200 square foot tents housing a camper van and storage; vehicles parked on grass; and a stream. Exhibit 1.

3. During a November 22, 2016 site visit, Ms. Vogl advised Officer Sawin that Mr. Hannah lived in a camper van or cargo container on the Property. Exhibit 1.

4. On January 31, 2017, the Department of Permitting and Environmental Review (DPER) issued a Notice and Order to Ms. Vogl and Mr. Hannah alleging: (1) placement/construction of accessory structures including two 400 square foot cargo containers, carport structure, and storage shed within critical areas and/or buffers; (2) occupancy of a substandard dwelling (recreational vehicle/camper/van); (3) placement of gravel driveways without required permits within environmentally critical areas and/or buffers (stream and potential wetland); and (4) parking/storage of vehicles on non-impervious (unimproved) surfaces. Exhibit 2.

5. At the hearing in this matter, DPER withdrew allegations that structures and/or the driveway may be located within a wetland or its buffer. As a result, the only critical area at issue in this decision is the on-site stream, which is an aquatic area under Chapter 21A.24 KCC.

6. Mr. Hannah (Appellant) timely appealed the Notice and Order alleging that there are no classified wetlands or streams on the Property; the stream should be classified as Type N or Type O, requiring a 65 or 25 foot buffer, respectively; and the driveway had been in existence since at least 1975. Exhibit 3.

7. On May 23, 2017, Environmental Scientist III/Ecologist Laura Casey and Officer Sawin conducted a site visit with Appellant. Exhibit 5 and Casey and Sawin Testimony. Ms. Casey determining that the stream, a tributary to Issaquah Creek, is a Type F stream.

8. On May 15, 2017, the Hearing Examiner issued a Pre-hearing Order setting forth the following issues for hearing in this matter:

   Has DPER made a *prima facie* case that:

A. Appellant placed accessory structures (two ~~400~~ 320 square foot cargo containers, carport structure, and storage sheds) on property located at 14803 29th Place SE, Issaquah, WA (the Property) in violation of the International Building Code?

B. Appellant placed accessory structures (two ~~400~~ 320 square foot cargo containers, carport structure, and storage sheds) on the Property within critical areas or their buffers?

Issues A and B have been revised in this decision as shown in strike through and underlining to reflect the accurate square footage of the cargo containers.

C. A substandard dwelling (recreational vehicle/camper/van) is being occupied in violation of Chapter 16.14 KCC and the International Property Maintenance Code?

D. Appellant has located a substandard dwelling (recreational vehicle/camper/van) in a critical area?

E. Appellant placed gravel driveways without permits required by Chapter 16.82 KCC?

F. Appellant placed gravel driveways in critical areas or their buffers?

Issue F has been revised in this decision as shown in the underlined language to include buffers to critical areas as alleged in the Notice and Order.

G. Appellant is storing or parking vehicles on non-impervious surfaces in violation of KCC 21A.18.110.I?

Issue A

9. Appellant did not contest Issue A. Exhibit 3.

Issues B and D

10. Structures are not allowed within an aquatic area, its buffer, or the building setback from the buffer. KCC 21A.24.045; 21A.24.200. Whether Appellant located structures within the stream buffer or its building setback depends upon the classification of the stream.

11. DPER classified the stream as Type F. Type F waters include all segments of aquatic areas that are not Type S waters and that contain fish or fish habitat. KCC 21A.24.355. Appellant argued that the stream should not be classified as Type F due to barriers to fish passage and poor water quality; portions of stream not investigated by Ms. Casey do not satisfy the criteria for presumptive use by salmonids discussed in Finding 13 below; it should be considered a ditch; and the agency maps contained in Exhibit 5, including those maintained by King County, the Washington Department of Natural Resources and Washington Department of Fish and Wildlife (WDFW) do not show a stream on the Property. Exhibit 3 and Appellant Testimony.

12. The determination of the appropriate stream typing starts with the definitions of "aquatic area" and "stream," which are somewhat circular. Aquatic areas include streams. KCC 21A.06.072C. A stream is "an aquatic area were surface water produces a channel, not including a wholly artificial channel, unless it is… used by salmonids…." KCC 21A.06.1240. The "it" in the preceding definition refers to a wholly artificial channel. Thus, a wholly artificial channel is considered a stream if it is used by salmonids. Salmonids include trout. KCC 21A.06.1015

13. In 2000, King County adopted a Public Rule entitled "Sensitive Areas: Presumption of Salmonid Use, Sensitive Area and Buffer Modifications, and Mitigation Requirements." Exhibit 5E. Although originally adopted to implement the predecessor to the current critical areas regulations, DPER continues to apply the Public Rule to determine whether a stream is used by salmonids. Casey Testimony. Under the Public Rule, if salmonid use is unknown, a stream is presumed to be used by salmonids if the stream has a defined channel two feet or greater in width between the ordinary high water marks and has a gradient of 16% or less. KCC 21A.06.825 defines "ordinary high water mark" as:

> "[T]he mark found by examining the bed and banks of a stream… and ascertaining where the presence and action of waters are so common and long maintained in ordinary years as to mark upon the soil a vegetative character distinct from that of the abutting upland…."

14. Below the footbridge crossing the stream, the stream is more than two feet wide with the grade of less than 16%. Casey testimony. Thus, under the Public Rule the stream is presumed to be used by salmonids. Under this presumption, even if the channel were wholly artificial, it would meet definition of a stream.

15. Appellant contended that in places the stream is less than two feet wide, but did not measure or offer evidence of the ordinary high water mark.

16. Thus, a Type F classification is proper, unless a blockage makes infeasible the stream's ability to provide fish habitat.

17. DPER may determine that an area upstream of a legal human-made barrier does not provide fish habitat if the barrier is not identified for removal. KCC 21A.24.355.C.

18. Exhibit 5D indicates that downstream of the Property two culverts create a total blockage and one (under 239th Place SE) created a partial blockage. As a result of lawsuits, King County and the State Department of Transportation are under orders to replace culverts under roads in their jurisdictions which create fish passage barriers. Casey Testimony.

19. Appellant presented several exhibits to support his contention that water quality in the stream is compromised. Ms. Casey explained that DPER considers sewage and other contaminants to be temporary chemical blockages which can be remedied and are not be considered permanent blockage. Nor, could the Examiner find that such blockages are legal human-made barriers.

20. KCC 21A.24.358.C.1 requires a 165 buffer for a Type F stream located in the rural area; KCC 21A.24.200 requires a 15 foot building setback from the buffer.

21. The Appellant measured the distance from the stream to the nearest container as 115 feet. DPER accepts his measurement. Exhibit 1.

22. Two cargo containers, two tents, and a recreational vehicle/camper/van are located within 180 feet of the stream.

Issue C

23. Appellant did not contest Issue C. Exhibit 3. At the hearing in this matter, he testified that he lives on the Property in one of the containers. Testimony of Mr. Hannah.

24. Vehicles may not be used for occupancy. KCC 16.14.170, 16.14.520, 21A.06.345, 21A.08.030, 21A. 28. 020.

Issues E and F

25. Appellant contends that the driveway/turnaround have been in place since 1975 and he created no new impervious surface. Exhibit 3. However, he offered no evidence to support his contention that the driveway has been in place for many decades. In his opinion, and impervious surface must have a depth of at least four inches and cannot have areas where grass or weeds grow through the surface. His definition of impervious as is at odds with the definition of that term in KCC 21A.06.625:

> "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… areas that are… graveled or made of packed or oiled earthen materials such as roads, walkways or parking areas.…"

26. The driveway/turnaround is impervious as that term is defined by KCC 21A.06.625

27. DPER presented evidence that the driveway/turnaround did not exist in the vicinity of the cargo containers and tents in 2015. Exhibit 7B. The two cargo containers that are the subject of alleged Violation 1 are located immediately to the east of the "pre-disturbance" area outlined in red on Exhibit 7B. These same cargo containers appear in Exhibit 6, a 2016 photograph taken by Officer Sawin in which a gravel driveway is readily apparent. These exhibits provide competent evidence that at some time between the 2015 and 2016 photographs, a gravel driveway/turnaround was constructed on the Property.

28. "Fill" means a deposit of earth material or recycled or reprocessed waste material consisting primarily of organic or earthen materials, or any combination thereof, placed by mechanical means. KCC 16.82.020.L. The driveway constitutes fill under this provision. Fill, in turn, constitutes grading as defined by KCC 16.82.020.O.

29. Unless specifically exempted under KCC 16.82.051, grading requires a clearing and grading permit. KCC 16.82.050.B. The grading does not fall within any of the exemptions contained in KCC 16.82.051.B.

30. The driveway/turnaround is adjacent to the cargo containers. As indicated in Finding 21, the parties agree that the cargo containers are located within 115 feet of the stream. It

follows that the driveway/turnaround is located within 180 feet of the stream (the sum of the Type F stream buffer and building setback from the buffer).

Issue G

31. Appellant did not contest Issue G. Exhibit 3.

32. Operable vehicles must be placed on an improved service with direct and unobstructed access to the driveway. KCC 21A.18.110.I.

CONCLUSIONS:

1. DPER bears the burden of proving by competent evidence that the alleged violations existed as of the date of hearing in this matter.

2. KCC 16.02.240.1 exempts from the requirement for a building permit residential accessory buildings used as tool and storage sheds, playhouses and similar uses of up to 200 square feet in size from the requirement. At 320 square feet, the cargo containers do not fall within this exemption. Cargo containers of this size require a building permit.

3. DPER properly determined that the on-site drainage feature is presumptively used by salmonids, contains fish or fish habitat and, therefore, should be classified as a Type F stream. It properly found that culverts which currently create complete or partial blockages to fish passage will be removed by the appropriate agency.

4. With the exception of the allegation that the driveway may be located within a wetland or its buffer, an allegation which it withdrew at the hearing, DPER has born its burden of proof that the violations occurred.

5. KCC 23.02.010.K defines “person responsible for code compliance” as:

> “[E]ither the person who caused the violation, if that can be determined, or the owner, lessor, tenant or other person entitled to control, use or occupy, or any combination of control, use or occupy, property where a civil code violation occurs, or both.”

Appellant is a person responsible for code compliance both as the person who caused the violations and as a tenant entitled to control, use and occupy the Property.

If they are located outside of the critical area, buffer, and building setback from the buffer, Appellant may be able to obtain building permits for the cargo containers. If used as habitable space, if they must satisfy building and zoning code standards, including the health codes.

6. Tents the size of which do not exceed 200 square feet may be used for storage accessory to the residence (other than vehicle storage or parking) if they satisfy all applicable setbacks and are not located in a critical area, critical area buffer, building setback from the buffer.

DECISION:

1. The appeal is **DENIED**.

2. No penalties shall be assessed against the Appellant or the subject property if the following actions are completed **by the deadlines set forth below**:

   For Violation no. 1:

   A. Remove the two cargo containers and carport from the subject property and move storage sheds that are 200 square feet or less outside of critical areas, buffers, and setbacks **by August 28, 2017**.

      OR

   B. Apply for and obtain the required building permits, inspections, and approvals with complete application to be submitted **by the following schedule**:

      i. Submit a permit pre-screening meeting request **by August 28, 2017**.

      ii. Submit a complete Critical Areas Designation (CAD) application **within 30 days of the building permit pre-screening meeting**.

      iii. Submit a complete application to the Health Department for approval **within 30 days of CAD approval** and provide a copy of the Health Department application to DPER.

      iv. Submit a complete building permit application **within 30 days of Health Department approval**.

   For Violation no. 2:

   C. Cease occupancy of recreational vehicle/camper/van **by August 28, 2017**.

   D. Remove the recreational vehicle from the property or park it on an approved impervious surface **by August 28, 2017**.

   For Violation no. 3:

   E. If a building permit for Violation no. 1 is pursued, combine the grading permit in one single permit following the same schedule listed above in Violation no. 1, Section B.

      OR

   F. If a building permit for Violation no. 1 is not pursued, apply for an obtain the required grading permits, inspections, and approvals with complete application to be submitted **by the following schedule**:

i. Submit a pre-screening meeting request for a permit **by August 28, 2017**.

ii. Submit a complete grading permit application **within 30 days of the pre-screening meeting**.

iii. If a permit to allow the work that was completed is denied, submit a complete restoration application **within 30 days of the final denial of any of the permits or approvals listed above**.

Note: Application for a permit does not ensure that a permit will be issued. The applicant should be aware that permit fees can be expensive and critical area restrictions may require a variance or reasonable use exception to county regulations in order to legalize work done without permits. Application for a variance or reasonable use exception can be an expensive and time consuming option and there is no guarantee that approval will be obtained. The alternative is to obtain a clearing/grading permit to restore the site to its original condition or as close to that condition as possible.

iv. Meet all deadlines for requested information associated with the permit(s) and pick up the permit(s) within the required deadlines. Make any required corrections and obtain final inspection approval **within one year of permit issuance**.

For Violation no. 4:

G. Cease parking/storage of vehicles on non-impervious surfaces by **August 28, 2017**.

ORDERED July 25, 2017.

Alison Moss
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.

MINUTES OF THE JULY 18, 2017, HEARING IN THE APPEAL OF SANDRA VOGL AND BOB HANNAH, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. ENFR160531

Alison Moss was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin and Bob Hannah.

The following exhibits were offered and entered into the record:

Exhibit no. 1	Department of Permitting and Environmental Review staff report to the Hearing Examiner for file no. ENFR160531
Exhibit no. 2	Notice and order, issued January 31, 2017
Exhibit no. 3	Notice and statement of appeal, received February 24, 2017
Exhibit no. 4	Codes cited in the notice and order
Exhibit no. 5	Letter from Laura Casey with critical areas review, dated June 12, 2017; Statement of qualifications of Laura Casey
	A. Aerial photograph with stream typing, dated 2015
	B. Aerial photograph, dated 2012
	C. Forest practice activity map, dated June 8, 2017
	D. Salmonscape map, dated June 12, 2017
	E. KCC Chapter 21A-24 of sensitive areas: presumption of salmonids, sensitive area and buffer modifications, and mitigation requirements, effective date May 4, 2000, amended July 19, 2002
	F. Wetland rating form, dated May 23, 2017
Exhibit no. 6	Photograph of subject property, dated June 30, 2016
Exhibit no. 7	A. Pictometry aerial of subject property, dated 2013
	B. Aerial of subject property, dated 2015
	C. Aerial of subject property
	D. Aerial of subject property
	E. Aerial of subject property
Exhibit no. 8	Map of environmentally sensitive areas
Exhibit no. 9	Isobar map
Exhibit no. 10	Photograph of stream, dated June 22, 2017
Exhibit no. 11	Photograph of stream, dated July 9, 2017
Exhibit no. 12	Photograph of stream, dated July 15
Exhibit no. 13	Photograph of stream
Exhibit no. 14	Photograph of stream
Exhibit no. 15	iMap aerial of property, dated 1998
Exhibit no. 16	Photograph of property
Exhibit no. 17	Photograph of property, dated July 17, 2017
Exhibit no. 18	Salmonscape map

AM/ed

July 25, 2017

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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR160531**

SANDRA VOGL AND BOB HANNAH
Code Enforcement Appeal

I, Elizabeth Dop, 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.

☒ caused to be 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 July 25, 2017.

Elizabeth Dop
Legislative Secretary

Bob Hannah, Sandra Vogl
Hardcopy

Casey, Laura
Department of Permitting and Environmental Review

Deraitus, Elizabeth
Department of Permitting and Environmental Review

Lux, Sheryl
Department of Permitting and Environmental Review

Sawin, Holly
Department of Permitting and Environmental Review

Williams, Toya
Department of Permitting and Environmental Review