October 31, 2017

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

REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR160242**

CHRIS AND STEPHANIE HERBERG
Code Enforcement Appeal

Location: 18023 322nd Place NE, Duvall

Appellants: **Chris and Stephanie Herberg**
18023 322nd Place NE
Duvall, WA 98019
Telephone: (425) 772-0536
Email: herberg41@yahoo.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
Email: holly.sawin@kingcounty.gov

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal in part, grant appeal in part

EXAMINER PROCEEDINGS:

Hearing Opened:	October 24, 2017
Hearing Closed:	October 24, 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.

After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, the examiner hereby makes the following findings, conclusions, and decision.

FINDINGS AND CONCLUSIONS:

1. In 2007, the Department of Permitting and Environmental Review (DPER) received complaints regarding construction and clearing and grading without permits. Apparently, the then-DPER officer in charge sent the then-owner an initial letter or two, but virtually nothing happened until after the case was reassigned to the current DPER representative in 2015. In February 2016 a representative from the bank (which by that point owned the property) started the application process to correct the violations.

2. In March 2016, Chris and Stephanie Herberg purchased the property out of foreclosure, and the Herbergs came to the initial DPER pre-screen meeting in May 2016. The Herbergs baulked on following through with the permit process, and in August 2017, DPER served a Notice and Order asserting (1) construction of an accessory structure (a 2000 square-foot barn) and (2) cumulative clearing over 7000 square feet, clearing and grading (construction of a riding arena), and within environmentally critical areas and/or their buffers. Ex. 2.

3. The Herbergs' timely appealed. Ex. 3. As to (1), the Herbergs did not contest that the barn was built without the required permit or their need to obtain a permit; instead, they requested an extension of time to obtain the permit. As to the (2), the Herbergs asserted there was no clearing, that any grading was below the threshold, and that because DPER did nothing on the complaint for a decade, DPER should not be allowed to require a permit now.[1] We went to hearing on October 24.

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

5. Mr. Herberg is correct that the pre-existing condition of much of the area worked in 2007 was already "cleared" in the sense of not being forested or heavily brushed. But that is not the entire extent of what legally qualifies as "clearing"; the term includes "removing of vegetation." KCC 16.82.020.D. So even plowing over the grassy area pictured in

[1] In our September 26 notice of hearing, we noted that the Herbergs were raising "laches," the defense that one who unreasonably delayed asserting a claim should not be able to assert it later. We explained that laches is categorized as an equitable defense, and "[e]quitable defenses…may be raised to exhaust administrative remedies and make a public record for judicial review, but they are beyond the examiner's jurisdiction to decide." Exam. R. III.A.1. We instructed the parties to create a thorough factual record related to laches at hearing, to enable (if desired) a court's later review.

Exhibit 6A—an area several multiples of the triggering 7,000 square-foot threshold—qualified as "clearing." KCC 16.82.051.C.3; Ex. 4 at 005.

6. As to grading, at some point the "clearing" versus "grading" line merges, as grading includes "excavating, filling or land-disturbing activity," with "land disturbing activity" itself defined as "an activity that results in a change in the existing soil cover, both vegetative and nonvegetative, or to the existing soil topography." KCC 16.82.020.O & Q. Certainly there was grading, including blading the footprints for the barn and the riding areas, gravelling the driveway, and filling the riding arena with at least sand. DPER's representative showed her work for how she calculated approximately 27,800 square feet of new impervious surface. While, as we explain below, not all of the new impervious surface the previous owners added in 2007 is impervious to the same extent, DPER has shown well over the 2000 square feet of post-2005, new impervious (to some degree) surface threshold. KCC 16.82.051.C.2; Ex. 4 at 005.

7. Finally, DPER alleges that not only did clearing and grading occur, but some of this occurred within an environmentally critical area and or its buffer. There are two potential buffers in play here. There is a steep slope along the edge of the road-paralleling stream. That is not particularly relevant here. The area of activity was well outside that buffer, and the 165-foot stream buffer extends well past the steep slope buffer anyway. Exs. 6C & 7. The best evidence in the record is the DPER representative's drawing and explanation that the northwest corner of the riding arena is approximately 158 feet from the creek, meaning a tiny swath of the riding arena corner is within a critical area buffer. As there is no threshold amount for such clearing or grading in a buffer without triggering a permit, DPER has proven a critical areas violation. KCC 16.82.051.B.2; Ex. 4 at 003.

8. An owner of property is ultimately responsible for code violations on her property, even if she was not the one who actually created the violation. *See, e.g.*, KCC 23.020.010.K. However, where, as here, an owner "affirmatively demonstrated that the violation was caused by another person or entity not the agent of the property owner and without the property owner's knowledge or consent," the code allows us to waive "[s]trict compliance with permit requirements" to "avoid doing substantial injustice to a non-culpable property owner." KCC 23.36.030.B. The operative word is "strict" compliance, not "all" compliance.

9. We have invoked that authority (and ordered DPER to apply something other than the normal permit requirements as a remedy for code violations caused by a previous owner) sparingly, typically where the current owners have attempted to apply for permits to rectify the violation but run into a wall, a prohibition against legalizing the previous work through the current permit process.[2] No such bar applies here. However one other

[2] For example, in *Larson-ENFR 120330*, a parcel size requirement and maximum square footage limitations on detached ADUs prevented the current owner from legally permitting an ADU constructed by a previous owner. We ordered the current owner to follow the usual rules for submitting an already-built-construction (ABC) pre-screening meeting request, for applying to the Health Department to legalize the water and septic, and for applying for (and obtaining) a building permit for the ADU, but we ordered DPER to waive the parcel and square footage restrictions when it reviewed the building permit application. See http://www.kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2014/ENFR120330_Larson.ashx?la=en.

element of the current scenario warrants extending our discretionary authority beyond simply removing a bar.

10. A critical areas violation greatly complicates the permit process, which is not surprising, given the importance of protecting such areas. But here the stream buffer would be the tail wagging the dog. Only a tiny fraction of the disturbance—a small swath of the corner of the arena—was in the buffer. Ex. 6B. Moreover, not all "impervious" surfaces are equally impervious and thus equally problematic. The roof of the barn is the most impervious. In the middle is the graveled driveway area, where Mr. Herberg confirmed the vegetation is "not really coming through" a decade after the work was completed. *See also* Ex. 5A at 007. And the least impervious end of the imperviousness spectrum is the riding arena. Ex. 5A at 006. While there may be some gravel underlying the riding arena,[3] the only direct testimony on that topic is Mr. Herberg's that he dug a test hole in the arena and found only sand.

11. The riding arena is a "new impervious surface" at least in the sense that any "compacted surface," even if just compacted dirt, can qualify. *See* 2016 Surface Water Design Manual, at 1-6.[4] Yet the "addition of a more compacted surface, like paving over pre-existing dirt or gravel" qualifies as well, *id.*, illustrating why imperviousness is not an all-or-nothing proposition—there are degrees and gradations. An even better illustration is that, in contrast with the driveway still relatively vegetation-free a decade after construction, a stand of alders is already reclaiming at least the corner of the riding arena that intruded into the buffer. Ex. 5A at 006; Ex. 6D. Mr. Herberg explained that the area has grown back even more since the photographs were taken, and that he has seen dear, rabbits, and even a bobcat in that area

12. For "sites that have been degraded under prior ownerships," the term "remediate" means to "restore to a condition that does not pose a probable threat to the environment or to the public health, safety or welfare." KCC 23.02.010.M. Here, given the minor intrusion into the buffer, and the alders and animals that have already reclaimed that buffer area, there is no (longer any[5]) probable environmental threat from the critical areas buffer intrusion. Thus, when the Herbergs come in for their permit to address the barn, driveway, and riding arena, they need not specifically address the buffer intrusion; the critical areas violation is deemed substantially in compliance.

13. As to deadlines, DPER noted that, given the currently-heated development environment, it might take time for the Herbergs to retain the consultants they need to enable them to apply for a building permit to address the barn building itself, especially because a completed building permit application requires Health Department approval to address the septic or (any) potable water implications of the 2007 work. We thus extend the submittal deadline by 120 days from today.

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[3] At hearing, DPER stated that the bank's 2016-permit application listed some gravel/crushed rock as having been put down under the riding arena.

[4] Available at https://your.kingcounty.gov/dnrp/library/water-and-land/stormwater/surface-water-design-manual/SWDM%202016%20complete%20document%20FINAL%20first%20errata%206%2015%202016.pdf.

[5] The eight years of inactivity on the enforcement action before the current officer was handed the case indicates it may never have been much of a threat.

DECISION:

1. The Herbergs' appeal is DENIED IN PART and GRANTED IN PART.

2. The August 15, 2017, Notice and Order is sustained except:

   A. the Herbergs qualify as non-culpable owners;

   B. the initial October 13, 2017, compliance date (listed several times) is extended to **February 28, 2018**; and

   C. the critical areas violation has been sufficiently remediated and is substantially in compliance.

3. No penalties shall attach, provided the Herbergs follow the applicable deadlines and any reasonable extensions DPER makes to those deadlines. Otherwise, DPER may assess penalties retroactive to today.

ORDERED October 31, 2017.

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 OCTOBER 24, 2017, HEARING IN THE APPEAL OF CHRIS AND STEPHANIE HERBERG, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. ENFR160242

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin and Chris Herberg.

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. ENFR160242
Exhibit no. 2	Notice and order, issued August 15, 2017
Exhibit no. 3	Notice and statement of appeal, received September 8, 2017
Exhibit no. 4	Codes cited in the notice and order

Exhibit no. 5

A. Photographs of subject property
B. Site plan for permit no. PREA160032

Exhibit no. 6

A. Aerial map of subject property, dated 2002
B. Aerial map of subject property, dated 2009
C. iMap of critical areas
D. Aerial map of subject property, dated 2017

Exhibit no. 7 Letter from DPER with critical areas information, dated March 16, 2016

DS/ed

October 31, 2017

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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR160242**

CHRIS AND STEPHANIE HERBERG
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 October 31, 2017.

Elizabeth Dop
Legislative Secretary

Deraitus, Elizabeth
Department of Permitting and Environmental Review

Herberg, Chris-Stephanie
Hardcopy

Lux, Sheryl
Department of Permitting and Environmental Review

Sawin, Holly
Department of Permitting and Environmental Review

Williams, Toya
Department of Permitting and Environmental Review