November 21, 2017

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
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REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR170163**

NORMAN AND SUSAN TURGEON
Code Enforcement Appeal

Location: 17031 NE 158th Street, Woodinville

Appellants: **Norman and Susan Turgeon**
17031 NE 158th Street
Woodinville, WA 98072
Email: susanlturgeon@gmail.com

King County: Department of Permitting and Environmental Review
represented by **LaDonna Whalen**
35030 SE Douglas Street Suite 210
Snoqualmie, WA 98065
Telephone: (206) 477-5567
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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 but extend compliance deadline

EXAMINER PROCEEDINGS:

Hearing Opened:	November 6, 2017
Hearing Closed:	November 6, 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, 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. Appellants Norman and Susan Turgeon purchased the subject property in late 2016. Exhibit (Ex.) 11A at 001. In early 2017 they received a warning letter from a neighbor that there were two drug houses in the area, and they found some drug paraphernalia on their property; in response they began constructing a six-foot perimeter fence. Exs. 11B, 11A at 001. To do this required clearing an area Appellants calculate at approximately 3,860 square feet. Ex. 8 at 001. Additionally, Appellants cleared alders from a strip at the front of their property through which a water district utility easement runs, an area they calculate to be approximately 2,000 square feet. Ex. 11A at 001; Ex. 5; Ex. 9.

2. In July, the Department of Permitting and Environmental Review served a Notice and Order, asserting that Appellants' clearing required a clearing permit. Ex. 2. Appellants timely appealed. Ex. 3. We went to hearing on November 6. 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.

3. The definition of clearing is quite broad: "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. And unless specifically excepted, "any" clearing requires a permit. KCC 16.82.050.B. The one potentially (and completely) exculpatory exception is "[c]umulative clearing of less than seven thousand square feet including, but not limited to, collection of firewood and removal of vegetation for fire safety." KCC 16.82.051.C.3. The crux of this case boils down to what is meant by "cumulative."

4. Appellants argue that "cumulative" should have some modifier, such as only that clearing they actually undertook themselves, or "annually" or something. Since there is no dispute that Appellants cleared less than 7,000 feet themselves since they purchased the property approximately year ago, they assert they do not need a permit. Conversely, DPER has long-interpreted "cumulative" to mean all cleared areas on a property, regardless of who performed the clearing and when. As their Bulletin on the topic phrases it, once a "site already exceeds 7000-square-feet of cleared area, any additional, clearing requires a permit." Ex. 10. Here, there is no dispute that a previous owner cleared approximately 45,000 square feet of the property for the house, garage, driveway, and landscaping, an area that remained cleared when the Appellants undertook their work on other portions of the property. Ex. 12. The question is whether the 45,000 square-foot cleared area meant the 7,000 square-foot exemption was already used up (meaning any new clearing either

had to fit within a different exemption) or whether Appellants had some sort of personal allowance or leeway to clear up to 7,000 additional square feet.

5. We agree with Appellants that there are sound policy arguments for setting some sort of temporal baseline for "cumulative." The code sets other such baselines:

- The sentence directly before the cumulative clearing exception exempts from the need for a permit grading that produces less than "two thousand square feet of new impervious surface on a single site added after January 1, 2005" or "less than two thousand square feet of new plus replaced impervious surface after October 30, 2008." KCC 16.82.051.C.2.

- Dropping down a few paragraphs of the same subsection, for invasive vegetation, the code allows cumulative clearing of "less than seven thousand square feet *annually*." KCC 16.82.051.C.7 (italics added).

- For the *total* clearing limits on Appellants' property—meaning the total the can be cleared even with a permit—the code excludes "the amount legally cleared before January 1, 2005, or cleared under a complete clearing permit application filed before October 25, 2004." KCC 18.82.150.A.2.a.

6. While we do not disagree with Appellants that the code would benefit from a baseline date or something allowing successive owners a certain allotment of permit-exempt clearing, that is not the way the operative code section is actually written. There is nothing ambiguous about the term "cumulative," meaning "increasing by successive additions," https://www.merriam-webster.com/dictionary/cumulative. In the absence of a modifier such as "annually," the meaning is clear. And like a court, when we are "presented with such clear language, we must assume the Legislature meant exactly what it said and apply the statute as written." *University of Washington v. City of Seattle*, 188 Wn. 2d 823, 832, 399 P.3d 519 (2017) (citations omitted). That is especially true where in the sentence before the C.3 entry (pegging impervious surface conditions to post-2005) and again a few paragraphs down in C.7 (which modified "cumulative clearing" with "annually"), our Council illustrated that it knew very well how to set a baseline qualifier.

7. Similarly, while we might prefer the addition of a clearing baseline similar to that incorporated into the other code sections we discuss above, we do not get to "add words where the legislature has chosen not to include them." *Nelson v. Department of Labor & Industries*, 198 Wn. App. 101, 110, 392 P.3d 1138 (2017).[1] Regardless of our preferences, our role is to interpret the codes "as they are written, and not as we would like them to be written." *Brown v. State*, 155 Wn.2d 254, 268 (2005) (citations omitted).

[1] Appellants' argument that not adding a modifier to "cumulative clearing" (something like "annually" or "under the current owner's watch" or "since [insert fixed date]") would mean adding up all the clearing since the County came to existence in 1852, Exhibit 11A at 004, is somewhat misplaced. Cleared areas can return to native vegetation. For example, at some point the water district cleared the easement area when it constructed its infrastructure. But by 2017 this strip had grown into a stand of alders. Ex. 5. That strip thus did *not* count as part of the "cumulative clearing" DPER calculated was on the property as of the start of 2017. Ex. 12.

8. Thus, the cumulative 7,000 feet of clearing exception does not obviate the need for a permit. Before concluding that Appellants must thus apply for permit, we turn to some of the other potentially-relevant exceptions:

- Removal of downed trees is exempt. KCC 16.82.051.C.24. While some of Appellants' clearing may have involved downed trees, that exception certainly does not cover the bulk.

- Hazardous trees are also exempt. KCC 16.82.051.C.25. While some of the trees, especially along the road, may have been hazardous, this too would have been a minority of the clearing.

- Maintenance for lawn, landscaping, and gardening for personal consumption is permit exempt. As noted above, some of the area within 45,000 square-foot, previously-cleared area includes landscaping. Ex. 12. But that is not the area Appellants were cited for working in. And while some of the easement strip Appellants cleared might now *become* lawn, this is not a fertile exemption now. Ex. 11E at 003, 006; Ex. 11F at 003; Ex. 11H at 008; KCC 16.82.051.B.

While discrete portions of their work may fall into one of the above categories, and thus Appellants' estimate that they cleared a 5,860-square foot area may somewhat overstate the nonexempt clearing they performed, Appellants most certainly performed some significant, nonexempt clearing earlier this year. Appellants must apply for a permit to legalize at least most of the work they performed.

9. We do not disagree with Appellants assertion that they are good stewards of their land. In fact, given the amount of native growth they have retained on their property, and the care they seem to take of it, they may be able to qualify for tax benefits. See http://www.kingcounty.gov/services/ environment/stewardship/sustainable-building/resource-protection-incentives.aspx. And if they add a forest stewardship plan, that would provide future regulatory flexibility.

10. Also, we do not question that Appellants had completely legitimate reasons for performing their work. Requiring a permit does not mean that activity is prohibited or cannot be legalized. But "it was a good idea" does not negate "it requires a permit." They must apply for a clearing permit now.

11. As to the burden applying for that permit may create, Appellants assert the process would cost $7,133 to even start. Clearing permits can sometimes be expensive, but today's scenario seem well-removed from that. Nothing jumps out as a hurdle (or adding complexity) to them legalizing their clearing "as is." Their clearing was not in any critical area or critical area buffer. DPER agrees it would not trigger drainage review. And Appellants are significantly under the total clearing limits above which even a permit cannot authorize the clearing. Some of their highlighted dollar entries, Exhibit 11T, do not seem applicable. Appellants thus appear to have overstated the likely permit costs. In any event, the cost of the permit does not obviate the need to obtain a permit.

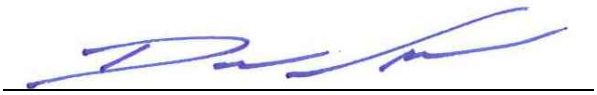
12. Finally, we are now well past the August 31 deadline the July 31 Notice and Order gave Appellants for submitting a complete prescreening meeting request, after which significant monetary penalties could attach if the deadlines are not complied with. We will thus extend that deadline by an additional 30 days from today.

DECISION:

1. Appellants' appeal is DENIED.

2. DPER's July 31, 2017, Notice and Order is SUSTAINED, except that the August 31 deadline for Appellants submitting a complete prescreening meeting request to DPER is extended to **December 21, 2017**. No penalties shall be assessed against Appellants or the subject property if the Notice and Order's deadlines—or any reasonable extension to a particular deadline DPER allows—are met. If not, DPER may assert penalties retroactive to today.

ORDERED November 21, 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 NOVEMBER 6, 2017, HEARING IN THE APPEAL OF NORMAN AND SUSAN TURGEON, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. ENFR170163

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were LaDonna Whalen, Susan Turgeon, Norman Turgeon, and Jeri Breazeal.

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. ENFR170163
Exhibit no. 2	Notice and order, issued July 31, 2017
Exhibit no. 3	Notice and statement of appeal, received August 24, 2017
Exhibit no. 4	Codes cited in the notice and order
Exhibit no. 5	Photographs of subject property, dated March 1, 2017

Exhibit no. 6 Photographs of subject property, dated March 7, 2017
Exhibit no. 7 Photographs of subject property
Exhibit no. 8 Letter from Susan and Norman Turgeon to DPER in response to March 13 enforcement letter, dated April 9, 2017
Exhibit no. 9 Aerial photographs of subject property, dated 2015 and 2017
Exhibit no. 10 Clearing and grading permits information bulletin no. 28, dated June 1, 2015
Exhibit no. 11

A. Introduction statement from Appellants, dated October 19, 2017
B. Letter from Neighborhood Clean Up, dated January 9, 2017; Letter from Alice Shelly and Doug Rusk, dated February 11, 2017
C. Photographs of subject property
D. Photographs of subject property
E. Photographs of subject property
F. Photographs of subject property
G. Photographs of subject property
H. Photographs of subject property
I. Photographs of subject property
J. Record survey for Jeff Meyer, dated February 2, 2006
K. Map of water supply mains easement and access road of Water District no. 104, dated December 16, 1977
L. Map of existing system in Woodinville Water District, dated August 11, 2008
M. Letter from Appellants to DPER in response to March 13, 2017 enforcement letter, dated April 9, 2017
N. Aerial photograph of subject property
O. Aerial photograph of subject property
P. Aerial photograph of subject property
Q. Letter from Appellants to DPER in response to July 31, 2017 notice of violation, dated August 24, 2017
R. King County Code Title 16
S. Clearing and grading information bulletin no. 28, dated June 1, 2015
T. Already-built construction pre-screening meeting request form

Exhibit no. 12 Aerial maps of subject property

DS/ed

November 21, 2017

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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR170163**

NORMAN AND SUSAN TURGEON
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 November 21, 2017.

Elizabeth Dop
Legislative Secretary

Breazeal, Jeri
Department of Permitting and Environmental Review

Deraitus, Elizabeth
Department of Permitting and Environmental Review

Lux, Sheryl
Department of Permitting and Environmental Review

Turgeon, Norman-Susan
Hardcopy

Whalen, LaDonna
Department of Permitting and Environmental Review

Williams, Toya
Department of Permitting and Environmental Review