August 4, 2016

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ORDER ON MOTION

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR150190**

GARY REMLINGER (NAO & SWO)
Notice and Order Appeal
Stop Work Order Appeal

Location: 6223 Carnation Duvall Road NE, Carnation

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Much of this case turns on terminology—whether certain activities qualify as "clearing" and whether one or more features on the property qualify as a "stream," "aquatic area," "channel," and/or "ditch." For brevity of discussion, we refer to areas on the subject property with two banks and a bed as a *channel*, and the vegetation removal activity Appellant conducted in the spring of 2015 as *clearing*. We use those word in italics merely as shorthand for the physical features and the activity, without implying any findings or conclusions. When discussing whether those features or activites meet legal defintions we employ quotation marks (i.e. "clearing").

Gary Remlinger (Appellant) owns several parcels adjacent to the Snoqualmie River, including 092507-9022 and 092507-9015, that together are referred to as the Sikes Farm. Pertinent to our discussion, and describing the relavant area from east to west, we have *channel B*, then parcel -9022 (a long, narrow railroad corridor-created parcel), then *channel A*, which is at or near the border shared by parcel -9022 and the most westerly area of our discussion, parcel -9015.

Approximately 13-acre area of cleared cropland has been established on parcel -9015 since the 1930s. Exs. 9A (showing caluculations) 16A (flat area, bottom center); 10, p. 28. But in March 2015, Appellant *cleared* a large swath of the remainder of parcel -9015. Ex. 8A; *compare* Exs. 9C (the "after") *with* 9C (the "before"). DPER initially filed a stop work order, followed by a formal notice and order. DPER asserted a clearing violation and critical areas violation on both parcels -9015 and -9022, and asserted that the critical area violated included both a stream and stream buffer. Ex. 3. We went to hearing last week.

At the conclusion of DPER's case-in-chief, Appellant's counsel argued that DPER had not made a sufficient *prima facie* showing, and he moved for judgment. We partially granted the motion, finding that DPER had not shown (and had admitted in response to our questioning that it did not have proof) that the clearing extended onto -9022[1] or that the *channel* (meaing the actual bed and banks) was touched. We denied the motion as it related to a "clearing" and "buffer" violations on -9015.

In response, Appellant sought a stay of our hearing for two weeks to allow him to seek a judicial writ, arguing that we were applying the wrong presumptions and that under the correct presumptions, he is was entitled to judgment. That is a highly unusual request. Appeals of land use decisions follow a straightforward process, the Land Use Petition Act (LUPA), which requires, before a court can review a local jurisdiction's enforcement of real property ordinance, a final determination by the local officer with the highest level of authority to make the determination. RCW 36.70C.020(2)(c). Here that is the undersigned. KCC 20.22.040(X). And we are not in a position to make a final determination now.

Having come of age in this arena after LUPA "replaced statutory writs of review for land use decisions," *Northlake Marine Works, Inc. v. State Dept. of Natural Resources*, 127 P.3d 726, 734 (2006), our knowledge of what avenues may survive to allow interlocutory challenges in land use cases is relatively thin. But Appellant is not seeking a writ for purposes of delay; our earlier-scheduled hearing was postponed once, but at DPER's request. Appellant's witnesses were present and ready to testify. Appellant and his counsel have played fair thus far in the process, and if there is an issue properly placed (both procedurally and substantively) before the courts now, we are not averse to giving them their shot.

There is some harm associated with pausing our proceedings for what seems likely a dead-end segway to the courts. DPER has proven (thus far) both "clearing" and critical areas violations, and allowing those to continue to go unremediated is not harmless. And we may need to hear more from DPER on rebuttal to make up for what by then might be (depending on how long the

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[1] Although not necessarily precise, the aerial DPER produced that shows its view of "clearing" also red lined the clearing as having occurred solely on -9015; the eastern edge of the *clearing* abuts, but does not appear to extend onto the -9022 corridor. Ex. 9B.

litigation plays out) our more attenuated recollection of DPER's case. But as Appellant stopped the clearing activity when presented with the stop work order in March 2015, the harm from an administrative intermission is not overwhelming. And should the court dcide to entertain the merits of the case, there are some issues that turn on law, not fact.

We thus explain the presumptions/burden standards we have (and unless a court instructs us otherwise, will) apply, starting with out Rules of Procedures (http://kingcounty.gov/~/media/independent/hearing-examiner/documents/Rules_of_Procedure_-_2008_Update.ashx?la=en). We will save—for our final decision—a witness-by-witness, in depth factual analysis. We focus here on the presumptions/burdens and the legal analysis.

Our Rules are in need of revision, especially in light of the examiner code overhaul that took effect at the end of March. KCC Chapter 20.22, replacing 20.24. When we propose rule changes later this year, we will target two pertinent to this discussion.

Rule XI(B)(8) states that while the burden of proof normally rests on an appellant, in enforcement appeals "the agency shall be required to present a *prima facie* case demonstrating that the legal standard for imposing such burden or penalty has been met." That rule both over-states and potentially under-states DPER's burden.

On the over- side, "[t]he scope of an appeal shall be limited to matters or issues raised in the appeal statement and any amendments to the appeal statement the examiner may authorize." KCC 20.22.080(G). So, for issues/matters not raised in an appeal, DPER bears no burden whatsoever—such are simply beyond the scope of the appeal.

Conversely and on the under- side, for those issues/matters appellant has preserved,[2] there are two senses of "prima facie"—the robust "sufficient to establish a fact or raise a presumption unless disproved or rebutted" and the weaker "what seems to be true based on first examination." *Prima Facie*, Black's Law Dictionary (10th ed. 2014). The latter perhaps implies a more fleeting or superficial burden. And an examiner conducting an independent evaluation of who fails to hold the government to its full burden of proof in an appeal of a citation creates a due process problem. *See, e.g.*, *Daily v. City of Sioux Falls*, 2011 S.D. 48, 802 N.W.2d 905, 913 (2011).

We do no such thing. Without expounding on the finer points of the burden-of-proof versus burden-of-persuasion versus burden-of-production,[3] we hew to the standard that "at any hearing to contest the determination that a civil code violation has occurred, the county has the burden of proving, by a preponderance of the evidence, that the violation was committed." KCC 23.20.030(I).[4] Phrased another way, we apply the rule, but in the sense that "[*p*]*rima facie*

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[2] In several pre-hearing orders, we identified seven issues Appellant had preserved for hearing, six of which we have jurisdiction to decide.

[3] See *Carle v. McChord Credit Union*, 65 Wn. App. 93, 98, 827 P.2d 1070, 1075 (1992), for a succinct explanation.

[4] Once a code enforcement violation is established, in a later penalty appeal "[t]he burden is on the appellant to demonstrate by a preponderance of the evidence that civil penalties were assessed after achieving compliance or that the penalties are otherwise erroneous or excessive under the circumstances." KCC 23.32.110. That is not inconsistent. It was the undersigned who (while serving as the land use ombudsman) pushed the County to adopt the penalty appeal provisions that became KCC 23.32.110-.120, believing the County's then-lack of such a process failed to meet *Post v. City of Tacoma*'s requirement that a local jurisdiction needed an "express procedure available

evidence means evidence that is 'sufficient' to sustain a judgment." *Matter of Detention of M.W. v. Dep't of Social and Health Services*, — P.3d —, ¶ 46 (2016).[5] As explained below, we conclude that DPER has met its burden of proving the remaining violations and need for permits by a preponderance of the evidence and would, absent more, be entitled to judgment. But if Appellant later puts on sufficient evidence to reverse the preponderance, the burden will return to DPER.

The other questionable rule is XI(B)(9). Subsection (c) is unremarkable: we "shall grant substantial weight or otherwise accord deference whenever directed by ordinance or statute." Fair enough. But then (d) states that:

> Substantial weight also may be given to the factual determinations and conclusions (but not to conclusions of law), made by public agencies charged with the administration of statutes and ordinances, with respect to matters within their jurisdiction.

That is troubling, and seems to cut against the very definition of a *de novo*, truly independent hearing. It also seems inconsistent with the rule that courts "must give substantial deference to both the legal and factual determinations of a hearing examiner as the local authority with expertise in land use regulations." *Durland v. San Juan County*, 174 Wn. App. 1, 12, 298 P.3d 757, 762 (2013). The examiner, not an agency, is the one entitled to the deference.[6] And if courts defer to us, us turning around and deferring to someone else seems a passing of the responsibility buck. We have never applied XI(B)(9)(d), we will not do so in this case, and when we recommend rules revision later this year we will suggest excising or significantly reworking that rule.

Turning to the two alleged violations, we start with the "clearing" violation. KCC 16.82.050(B) is expansive, noting that "Unless specifically excepted under K.C.C. 16.82.051, a person shall not do any clearing… without first having obtained a clearing…permit" or other permit review. Combining that with the expansive definition of "clearing" as "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), even mowing a lawn ostensibly requires a permit. Of course it would not—"Maintenance of lawn" is exempted from the permit requirement. KCC 16.82.051(C)(13). But because the burden to show an exception to a statute usually rests on the one trying to prove an exception applies, it would place on every County resident who mows a lawn the burden to show an exception to the otherwise mandatory requirement for a permit.

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by which citizens may bring errors to the attention of their government." 167 Wn.2d 300, 315, 217 P.3d 1179, 1186 (2009). *Post* did not require the government to bear the burden of proof in such a secondary appeal, once the violation had been established.

[5] As an earlier Court put it, "a prima facie case does not shift the burden of proof or require the adversary to prove the negative by the preponderance of the evidence." *Gillingham v. Phelps*, 11 Wn.2d 492, 501-02, 119 P.2d 914, 918 (1941).

[6] The undersigned has many faults. A runaway ego is not one of them. The courts' deference may simply be a twist on Justice Jackson's pronouncement that the Supreme Court is not final because it is infallible; it is infallible only because it is final. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring). The deference may simply reflect the examiner being the final County decision-maker on many matters.

We have long resolved this problem by requiring DPER to show either "clearing" in excess of the 7,000 square feet of cumulative clearing the code exempts from permit requirements, KCC 16.82.051(B)&(C)(2), or to show clearing within a critical area or buffer. Clearing within an aquatic area or its buffer is exempt only if it is firewood for personal use or forest fire prevention; there is no 7,000 square-foot exemption. KCC 16.82.051(B)&(C)(4)&(23). This explains why DPER's notice and order did not just cite Appellant for "clearing," but instead for "clearing of vegetation to exceed a cumulative area of 7000 square feet (recently estimated at over 6 acres[7]) and within the environmentally critical areas (stream and stream buffer)." Ex. 3.

Thus, DPER has the burden of showing over 7,000 square feet of "clearing" (first violation) and (for the second violation) that at least some of this "clearing" took place within the buffer of a critical area. The first question is the easier one.

As noted above, over 7,000 square feet of "cumulative clearing" normally requires a permit. KCC 16.82.051(C)(2). Most threshold limits set a baseline date against which to measure activity. For example, the County's 2016 Surface Water Design Manual (Manual) sets the "existing site conditions" (against which new projects are evaluated for drainage) as "those that existed prior to May 1979 (when King County first required flow control facilities)."[8] Similarly, for "grading," the baseline is impervious surface "added after January 1, 2005," the date that code section became effective. KCC 16.82.051(C)(1). Conversely, KCC 16.82.051(C)(2) sets no explicit baseline date against which to measure "cumulative clearing."

That is troubling. Does "cumulative" mean since the dawn of time? Would it include pre-Columbian, Native American active land management practices like frequent, low-intensity prescribed burns? Would it peg to the first European settler taking an axe to wood? Again, since at least 1936, an approximately 13-acre, 57,000 square-foot area of the subject property has been *cleared*. The inference would be that "clearing" even a single square foot of vegetation outside the 80-year established cropland boundary would require a permit. Bold stuff, indeed.

But ours is not the case to tackle that.[9] Appellant has not challenged DPER's estimate that he *cleared* approximately 7.7 acres (over 335,000 square feet) in 2015. Purposefully setting aside the established cropland, that is 48 times the threshold limit. Even assuming that later testimony will show that some of *cleared* area was not really "cleared," if even a tiny fraction of Appellant's *clearing* activity was "clearing," it was a violation to do so without first obtaining a permit. We turn to the definition now.

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[7] DPER explained at hearing how it used GIS to estimate 7.7 acres of clearing. It is not clear how DPER had earlier arrived at its April 2015 figure of 6 acres. In many examiner cases, a few square feet matter. With the hundreds of thousands of square feet in play here, the difference is not material, at least at our stage.

[8] http://your.kingcounty.gov/dnrp/library/water-and-land/stormwater/surface-water-design-manual/SWDM%202016%20complete%20document%20FINAL%20first%20errata%206%2015%202016.pdf at 1-3. Where drainage plan for land cover changes are approved via a later County development permit or approval, the "existing site conditions" baseline automatically updates to incorporate this. *Id.*

[9] More accurately, the violation stage is not the time to decide that. How Appellant's "clearing" might be weighed for purposes of permit review might bring the baseline question to the fore. We will tackle that at the appropriate time.

In determining how to categorize activity under the clearing and grading code, KCC 16.82.051(C)(2) instructs that "where an activity may be included in more than one activity category, the most-specific description of the activity shall govern whether a permit is required." The two categories in question are "clearing" (meaning "the cutting, killing, grubbing or removing of vegetation or other organic material by physical, mechanical, chemical or any other similar means") and "Horticulture activity including tilling, discing, planting, seeding, harvesting, preparing soil, rotating crops and related activity." Between those two, we have little trouble concluding that although the March 2015 *clearing* might have been undertaken in order to subsequently allow for horticultural or grazing activities, it was firmly in the "clearing" camp. This is strengthened by—but not reliant on—the draft Farm Plan's description of the lands outside the 13 acres as "otherlands" (as opposed to "crop") and work outside these 13 acres as "brush management." Ex. 10, p. 20.

We are fully cognizant of having heard only half the story. Appellant was slated to personally testify about farming practices, both in general and on the specific property. Based on this testimony he may be able to successfully argue that the *clearing* should be considered "horticultural activity" exempt from a permit. But Appellant elected to freeze our proceedings before he could tell his story. Based on the *current* record there is a "clearing" violation.

The critical areas issue is more involved. That is, while the "clearing" question awaits some critical factual development, there are two potential bases on which Appellant could win on the "critical areas" violation. One requires Appellant's factual development, but the other is potentially ripe for resolution (if, as a procedural matter, the court decides to weigh in now).

We start with the basic definitions in play:

> **21A.06.037 Agricultural drainage.** Agricultural drainage: any ditch, tile system, pipe or culvert primarily used to drain fields for horticultural or livestock activities.
>
> **21A.06.072.C. Aquatic area.** Aquatic area:
> A. Any nonwetland water feature including:
> 1. All shorelines of the state, rivers, streams, marine waters and bodies of open water, such as lakes, ponds and reservoirs;
> 2. Conveyance systems, such as a ditch, if any portion of the contributing water is from an aquatic area listed in subsection A.1. of this section;
> 3. Impoundments, such as a reservoir or pond, if any portion of the contributing water is from an aquatic area listed in subsection A.1. of this section.
> B. "Aquatic area" does not include water features where the source of contributing water is entirely artificial, including, but not limited to, a ground water well.
>
> **21A.06.181 Channel.** Channel: a feature that contains and was formed by periodically or continuously flowing water confined by banks.

> **21A.06.326 Ditch.** Ditch: an artificial open channel used or constructed for the purpose of conveying water.
>
> **21A.06.1240 Stream.** Stream: an aquatic area where surface water produces a channel, not including a wholly artificial channel, unless it is:
> A. Used by salmonids; or
> B. Used to convey a stream that occurred naturally before construction of the artificial channel.

The definitions, written at different times by different drafters, do not mesh together seamlessly. For example, if a "channel" is defined as something "formed" by water, than something artificially dug could never be a "channel," it being "formed" by people, not by water. Yet this would negate the definition of a stream as explicitly including even a "wholly artificial channel," so long as that artificial channel is used by salmonids or replaces a former natural stream: a "wholly artificial channel" could never be a stream, even if it was the busiest salmon run in the entire state, because that channel was not "formed" by water and thus is not actually a "channel" at all!

Instead, we apply the following construction: An aquatic area includes several nonwetland water features, including (pertinent to our discussion) streams, rivers and lakes; it also includes conveyance systems like a ditch, if any portion of the contributing water for that ditch is from a river, lake, or stream. KCC 21A.06.072.C(A). And a stream is a subset of aquatic areas that includes wholly artificial channels, if that artificial channel is used by salmonids or replaces a former natural stream. KCC 21A.06.1240(A).

DPER witnesses, on our questioning and counsel's, agreed that the basis of DPER's asserted critical areas violations was "clearing" on the eastern edge of -9015, in the vicinity of *channel* A and B. They did not dispute that the ditch qualified as "agricultural drainage," it "primarily" being used to drain fields. KCC 21A.06.037. In fact, they agreed that under non-flood conditions the *channels* only drain agricultural fields. They also agreed that there was no evidence the *channels* replaced a naturally occurring stream.

Instead, the issue comes down to fish and floods.

The first basis for DPER's assertion that *channels* A and B are artificial channels used by salmonids and thus qualify as a "stream" comes from a 2002 Public Rule that could really use some updating. First, the Rule uses pre-Critical Areas terminology like "class 1" and "class 2" streams. Ex. 7, p. 3. Conversely, the current code classifies aquatic areas such as streams as Type S, F, N, or O, depending on several factors. KCC 21A.24.355. Mixing the old Sensitive Areas terminology with the newer Critical Areas terminology invites confusion. Second, saying "Class 1 stream or Class 2 stream used by salmonids shall be presumed to be used by salmonids" seems somewhat nonsensical: if a stream is actually used by salmonids, it is not "presumed" to be used by salmonids—it is used by salmonids. But the Rule may have some applicability. And both Pesha Klein and Kollin Higgins explained why, based on channel size and gradient (a defined channel two feet or wider, with a gradient of 16 percent or less) they concluded the presumption applied. That presumption is, standing alone, enough to survive Appellant's motion. But—future

looking—it is only a "presumption" that Appellants could rebut. Of all the parts of DPER's case, the "these are critical areas based on the Public Rule" was the weakest. And because it is only a presumption, it is highly unlikely that the ultimate result of a full hearing will turn on the Rule. But it is strong enough to survive a directed verdict, given Appellant's lack of evidence (thus far) that could rebut the presumption.

More robust, and more convincing, was witness testimony, especially Kollin Higgins', that these *channels* likely have salmon and are salmon habitat, at least when the Snoqualmie floods.

In making his motion, counsel pointed to a sentence in a document Mr. Higgins worked on that appears, at least on the surface, inconsistent with his testimony about the likely presence of fish in *channels* A and B. Ex. 15, p. 4 ("Remnants of an elevated berm and a drainage way, considered to be a class 3 stream, run the length of [-9022]."). Focusing on that sentence for the first time, we attempted to recall Mr. Higgins (who was sitting in the room) to the stand to address the matter. Counsel objected, noting that as DPER had already presented its case, it should not be allowed to augment it for purposes of his motion. We sustained his objection. However, counsel must live with the consequences: a single sentence Mr. Higgins was not cross-examined on and not given the chance to explain does not alter our view (at this point) of his solidly persuasive testimony.

Thus we conclude that *channels* A and B are "streams" used by salmonids and also "aquatic areas" (being "streams" and also "conveyance systems, such as a ditch," where at least some portion of the contributing water is from the Snoqualmie River and from Horseshoe Lake). KCC 21A.06.1240(A); KCC 21A.06.1240(A)(1)&(3). Based on the evidence thus far in the record (and subject to Appellant's presentation)[10] *channels* A and B "contain fish or fish habitat" and thus are Type F waters with a 165-foot buffer. KCC 21A.24.355(A)(2); -.358(C)(1). And there is no dispute that at least some of the *clearing* (which for now we find to be "clearing") occurred within this buffer.

That is not necessarily dispositive, because the Critical Areas code carves out some exceptions. First, horticultural activities "in continuous existence since January 1, 2005, with no expansion within the critical area or critical area buffer" are exempt from Critical Areas regulation and "'Continuous existence" includes cyclical operations and managed periods of soil restoration, enhancement or other fallow states associated with these horticultural and agricultural activities." KCC 21A.24.045(C)(53).[11] Based on the current record, and even with this relaxed definition of "continuous existence," the areas of -9015 outside the 13 acres of cropland were not in continuous existence in the decade preceding Appellant's *clearing*. The following paragraph (54) allows expansion of new agricultural activities; however, the bedrock requirement is that "the activities are in compliance with an approved farm management plan in accordance with K.C.C. 21A.24.051." KCC 21A.24.045(C)(54)(c).

[10] This would include Appellant's experts' report, marked as Exhibit 14 but not yet entered into the record. It would also include their expert's initial report, submitted as a part of Exhibit 10, which we would consider after we have qualified them as expert witnesses.

[11] The idea that something is *allowed* in a critical area does not mean the activity does not otherwise require a permit. For example, KCC 21A.24.045 allows things like new dock construction, forest practices, driveway construction, and placement of an on-site sewage system. That those activities are allowed in critical areas does not magically exempt them from needing a building permit, forest practices permit, or Health Department approval, etc.

But Appellant elected to undertake his March 2015 *clearing* without first obtaining a Farm Plan. Post-enforcement, Appellant did work with King Conservation District[12] to produce a draft plan. Ex. 10. But that is only draft, and even if finalized between Appellant and the District, it is not effective (for Critical Areas purposes, at least) until approved by the County. KCC 21A.24.051(G).[13] So the exception in KCC 21A.24.045(C)(54) does not apply.

That does not mean a Farm Plan could not retroactively bring relief to the otherwise-applicable Critical Area restrictions. In certain scenarios, a farm plan can reduce applicable buffers down to as little as 25 feet, KCC 21A.30.045(B)(1), greatly reducing what might need to be restored. And while GMA contains a non-prioritized list of competing values, such as agriculture and environment, an "applicant seeking to use the process to allow alterations in critical area buffers shall develop a farm management plan based on the following goals, which are listed in <u>order of priority</u>: 1. To maintain the productive agricultural land base and economic viability of agriculture on the site." KCC 21A.30.045(B)(1) (underscore added).

A farm plan would not avoid the need for a clearing permit; KCC 21A.24.051 is crystal clear that it "does not modify any requirement that the property owner obtain permits for activities covered by the farm management plan." But it could greatly shape the remedy that a clearing permit would require. In fact, when counsel announced—after we issued our partial denial of his motion—that he wished to pause the hearing and go an alternative route, we momentarily assumed he meant pause the proceedings to obtain a finalized/approved Farm Plan and clearing permit that would resolve the dispute. We will provide, in the final paragraph, that option.

If Appellant continues litigating, there are two potential ways Appellant could attack the critical areas violation. The first avenue includes factual contentions; at least two of his witnesses were slated to directly address these topics. Such issues are premature now. The second avenue, however, involves purely legal issues that, should the court decide to entertain the merits, are not premature to address now; we highlight those now.

Just as Appellant's premise that we read in some unwritten presumption or caveat against applying the Clearing and Grading or Critical Areas codes for agricultural properties is bold, so is DPER's theory of the case here. These channels are not aquatic areas/streams because of anything particularly noteworthy about those features, or because (under normal conditions) they drain anything other than agricultural fields. Instead the "contributing water…from an aquatic area" the ditches convey are flood waters coming from the Snoqualmie River and potentially Horseshoe Lake. And the *channels'* use by salmonids appears limited to flood conditions. We are aware of nothing in the County code that exempts that scenario from protection under the County's Critical Areas code. But if the court chooses to do so, it could certainly weigh in on whether some other principle makes, as a matter of law, the factual scenario (established thus far) exempt from our code's reach.

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[12] King Conservation District is not a King County department.

[13] Per hearing testimony, the approval would come from Department of Natural Resources and Parks, not from DPER.

Appellant cited three other sources of definitions aside from the County code. Two of these are inapplicable; the third is applicable but does not change (based on the evidence admitted so far) the outcome.

Appellant cites to the definition section of the Growth Management Act (GMA) for its definition of "critical areas." RCW 36.70A.030(5). But we are not the Growth Management Hearings Board deciding whether a county comprehensive plan or regulation passes GMA muster. We are tasked with deciding whether Appellant has violated the particular County regulations that have survived those GMA challenges.

Appellant also points to the Hydraulic Code Rules for WAC 220-660-030(153)'s definition of "stream." Had Appellant been clearing in the actual stream or stream bed, the question of whether he needed a Hydraulic Project Approval (see WAC 220-660-040) might have been in play. As we found that he was not, the Hydraulic Code Rules are inapplicable. This is not a definitional smorgasbord.

The state Shoreline code is different. KCC 21A.25.020 explicitly notes that the definitions in chapter 90.58 RCW apply within the shoreline jurisdiction, and in case of a conflict trump the County's definitions. RCW 90.58.065(2)(a) states that:

> "Agricultural activities" means agricultural uses and practices including, but not limited to: Producing, breeding, or increasing agricultural products; rotating and changing agricultural crops; allowing land used for agricultural activities to lie fallow in which it is plowed and tilled but left unseeded; allowing land used for agricultural activities to lie dormant as a result of adverse agricultural market conditions; allowing land used for agricultural activities to lie dormant because the land is enrolled in a local, state, or federal conservation program, or the land is subject to a conservation easement; conducting agricultural operations; maintaining, repairing, and replacing agricultural equipment; maintaining, repairing, and replacing agricultural facilities, provided that the replacement facility is no closer to the shoreline than the original facility; and maintaining agricultural lands under production or cultivation;

RCW 90.58.065(2)(a) does seem a little broader than KCC 21A.24.045(C)(53)&(54). And the subject property is within the shoreline jurisdiction. Based on the current record, RCW 90.58.065(2)(a) does not command a different result. But when Appellant puts on his case, he may be able to show otherwise.

Finally, we turn to two cases Appellant cited at hearing as supporting his motion for judgment.

Appellant asserts that *Van Sant v. City of Everett*, 69 Wn. App. 641, 849 P.2d 1276 (1993), applies here and entitles him to judgment. *Van Sant* is inapposite. Appellant argues that DPER has not shown abandonment. But DPER had no need to. First, the landowner has to burden to prove a use existed prior to the contrary zoning ordinance. *King County, Dep't of Dev. & Envtl. Services v. King County*, 177 Wn.2d 636, 643 305, P.3d 240 (2013). While it is undisputed that an approximately 13-acre area square of cropland has been established on -9015 since the 1930s,

Appellant has not established (indeed, has not even started his presentation of his evidence) particular agricultural uses in the area of 2015 *clearing*.[14] Second, and more simply, this is not a non-conforming use case. It is not even clear what "contrary zoning ordinance" (*cf.* 177 Wn.2d at 643) is alleged to have been the causal agent. More importantly, this issue was not raised in Appellant's statement of appeal, nor detailed in the various iterations of the issues-for-appeal in our several pre-hearing orders. It is beyond the scope of this appeal. KCC 20.22.080(G). Even if it were a non-conforming case, a "local government may impose regulations on nonconforming uses, such as requiring a permit as a condition of those uses' continued legality," *Johnson v. City of Seattle*, 184 Wn. App. 8, 15, 335 P.3d 1027, 1031 (2014). So establishing a non-conforming use would not necessarily resolve whether a permit was required.

Similarly, Appellant's citation to *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007), seems unavailing. There the *clearing* restriction was limited to "undeveloped or partially developed lots." *Id.* at 642. We are not aware of any equivalent limitation in either the Clearing and Grading code (KCC Chapter 16.82) or the Critical Areas code (KCC Chapter 21A.24). We could see a policy argument for exempting Agricultural Production District parcels or ongoing farming properties from those chapters, but the drafters of the code have not done so. Appellant may be able to make an argument to the court that it should create some such presumption; we are not in a position to do so.

In conclusion, we will allow Appellant until **August 18, 2016**, to advise us and DPER that he (a) has sought interlocutory review of this order, (b) has decided to complete a farm plan and later seek a clearing permit and wishes the examiner to continue to hold this appeal while he does that, or (c) seeks to reconvene our hearing forthwith. After August 18, 2016, we will issue an order providing, as appropriate, for an opportunity to DPER to respond and a schedule going forward.

One drawback is that our putting these words to paper could give a party—especially Appellant, who has yet to put on a case, but even DPER (who plans a rebuttal)—to attempt to bring in new evidence to tailor the case to this order. We will do our best to keep anyone from gaining a strategic advantage, confining a continued hearing to the same witnesses covering the material the witness lists said they would cover. In a sense, we will hit the suspended animation button now and—absent some contrary instruction from the court—pick up exactly where we left off last Thursday.

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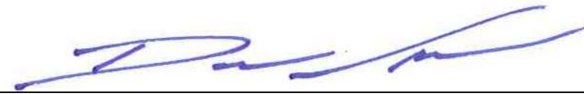
[14] Moreover, if our case involved non-conforming uses, and Appellant established some agricultural uses at some historical point in time on the cleared areas, the burden shifting wheel could continue to turn.

> When an ordinance establishes a set time beyond which a nonconforming use cannot remain unused without being forfeited, the burden shifts back to the owner to prove the lack of intent to abandon: "If the ordinance references a time frame… a rebuttable presumption arises that the land occupier has intended to abandon the non-conforming use."

Miller v. City of Bainbridge, 111 Wn. App. 152, 43 P.3d 1250 (2002) (*quoting Skamania Co. v. Woodall*, 104 Wn. App. 525, 540-41, 16 P.3d 701 (2001). Here, that would be non-use for a period of twelve months. KCC 21A.32.045(C)(2) (where use discontinued for more than twelve months, applicant must provide documentation demonstrating no intent to abandon use).

DATED August 4, 2016.



David Spohr
Hearing Examiner

DS/ED

MINUTES OF THE JULY 26, 2016 AND JULY 28, 2016 HEARING IN THE APPEAL OF GARY REMLINGER (NAO & SWO), DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. ENFR150190.

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Jina Kim, Holly Sawin, Peter Ojala on behalf of Gary Remlinger, Pesha Klein, Matt Maynard, and Kollin Higgins.

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. ENFR150190.
Exhibit no. 2	Stop work order, issued March 13, 2015
Exhibit no. 3	Notice and order, issued April 30, 2015
Exhibit no. 4	
A.	Stop work order notice of appeal, dated March 27, 2016
B.	Stop work order statement of appeal, dated April 2, 2015
C.	Notice and order notice of appeal, dated May 19, 2016
D.	Notice and order statement of appeal, dated May 26, 2015
Exhibit no. 5	Codes cited in notice and order
Exhibit no. 6	
A.	DPER critical area report, dated March 30, 2015
B.	Aquatica Environmental Consulting critical area report, dated December 8, 2014
C.	Internal DPER letter, dated May 23, 2016
Exhibit no. 7	DPER chapter 21A-24 sensitive areas rules and regulations, effective date May 4, 2000, amended July 19, 2002
Exhibit no. 8	
A.	Photographs of site visit, dated March 13, 2015
B.	Photograph of site visit location, dated March 13, 2015
Exhibit no. 9	
A.	Photograph of subject parcels, dated 2013
B.	Photograph of subject parcel, dated 2015
C.	Photograph of subject parcel, dated 2015
Exhibit no. 10	Farm conservation plan, dated September 2015
Exhibit no. 11	Photographs of flood maps, dated June 28, 2016 and November 6, 2006
Exhibit no. 12	Curriculum vitae of Kollin Higgins
Exhibit no. 13	
A.	Photograph of Snoqualmie flood
B.	Photograph of Snoqualmie flood
C.	Photograph of Snoqualmie flood
Exhibit no. 14	*Reserved for Essency report, dated June 3, 2016*
Exhibit no. 15	Farmland preservation program of Hendry property base line documentation, dated May 10, 2011

Exhibit no. 16

A. Lidar photograph of parcel, dated 2014
B. Photograph of parcel, dated March 2015
C. Lidar photograph of parcel, dated 2014
D. Photograph of parcel, dated March 2015

August 4, 2016

OFFICE OF THE HEARING EXAMINER
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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR150190**

GARY REMLINGER (NAO & SWO)
Notice and Order Appeal
Stop Work Order Appeal

I, Elizabeth Dang, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **ORDER ON MOTION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties of record/interested persons and primary 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 of record/interested persons to addresses on record.

☒ caused to be placed via County INTEROFFICE MAIL to County staff to addresses on record.

DATED August 4, 2016.

Elizabeth Dang
Legislative Secretary

All Parties of Record

Deraitus, Elizabeth
Department of Permitting and Environmental Review

Kim, Jina mailed paper copy
Prosecuting Attorney's Office

Klein, Pesha
Department of Permitting and Environmental Review

Lux, Sheryl
Department of Permitting and Environmental Review

Maynard, Matt
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Ojala, Peter mailed paper copy
Ojala Law

Remlinger, Gary mailed paper copy
Sikes Farm

Sawin, Holly
Department of Permitting and Environmental Review

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Williams, Toya
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