August 8, 2018

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

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR170114 Supplemental**

JAMES PREKEGES AND RONALD BUTLER
Code Enforcement Appeal

Location: Parcel nos. 1725069085, 1725069086, 1725069017

Appellants: James Prekeges and Ronald Butler
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SUMMARY OF RECOMMENDATIONS/DECISION:

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

EXAMINER PROCEEDINGS:

Hearing Opened:	July 17, 2018
Hearing Closed:	July 17, 2018

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:

Overview

1. This is an interesting case. The facts here are not really in dispute. Rather, there is a legitimate dispute about how to interpret the code language that applies to our facts. Ultimately the case is a close call, with the outcome turning on burdens of proof and the applicability of statutory interpretation canons. We conclude by granting the appeal, though not on the primary offered ground.

Background

2. The subject property has long had a driveway, overgrown but visible on historic maps. Exs. 6, P5. James Prekeges ("Appellant") explained at hearing how he concluded that the driveway had been there since the 1930s, likely built concurrently with the dairy barn.[1] Appellant testified that the surface was pre-existing gravel put down a long time ago—there when he moved into the neighborhood in 1988.

3. In the decades since his 1998 purchase, Appellant patched various holes where wear was occurring, mostly near the culvert. The driveway was compact enough that even his heavy tractor did not sink in (at least outside of the discrete segments he patched up).

4. Starting in 2015, Appellant undertook two major, road-related projects. First, he re-graveled the entire driveway, though staying within the lateral and vertical extent of the historic bed. Ex. 6 at 001. He later constructed a spur road off the driveway, across what was then a field, to reach a site for well-drilling. Combined, his projects covered just under 10,000 ft.^{2} of surface area, with the spur encompassing approximately 1,600 ft.^{2} of that total. Exs. 6 at 002, P4.

5. In March of this year, the Department of Permitting and Environmental Review (DPER) served a notice and order alleging that Appellant's activities had resulted in "[c]reation of 2,000 ft.^{2} or more of new and/or replaced impervious surface without the required grading permit, inspections and approvals," and requiring Appellant to obtain a permit. Ex. 2. Rather than apply for a permit, Appellant appealed in April. Ex. 3. We went to hearing last month.[2]

[1] Ronald Butler was listed on DPER's notice and on Mr. Prekeges' appeal, but he did not appear at hearing, nor was his role discussed. We will thus refer to Mr. Prekeges as "Appellant."

[2] Our decisions are due within ten business days of a hearing's close. KCC 20.22.220.A. The hearing date that best worked for the parties was right before our extended trip to Canada. We obtained the parties' advanced consent to

Introductory Analysis

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. However, the default rule across civil and criminal disciplines—that the government bears the initial burden of proving a statutory violation—is usually modified by the addendum that one claiming the benefit of an exception to a statutory prohibition bears the burden of establishing that she comes within that exception. *See, e.g., United States v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967) (civil); *United States v. Guzman-Mata*, 579 F.3d 1065, 1072 (9th Cir. 2009) (criminal).

7. As analyzed further below, the default requirement is that all clearing and grading requires a permit, unless specifically excepted. KCC 16.82.050.B. The parties identify two exceptions as potentially applicable—routine and normal driveway maintenance, and creation of less than 2,000 ft.² of impervious surface. KCC 16.82.051.C.

8. The parties debate the intersection of those two exceptions. Pointing to the provision 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," KCC 16.82.051.B, Appellant argues that even if he added more than 2,000 ft.² of impervious surface, because it was road maintenance, and because the road maintenance exception is the more specific, he is exempt. DPER argues that even normal and routine road maintenance that creates more than 2,000 ft.² of impervious surface is not exempt.

9. We do not see the relation between those two exceptions as so easy to generalize. It is difficult to see how adding over 2,000 ft.² of new (or replaced) impervious surface would best be characterized as "normal and routine maintenance" of a private driveway. Similarly, creating a new road of less than 2,000 ft.² would not qualify as "normal and routine maintenance," but it would not necessarily require a permit. Conversely, if the work was within certain critical area buffers, the less-than-2,000-ft.²-of-impervious-surface exemption would not be a safe harbor, but "normal and routine maintenance" would be. *See* KCC 16.82.051.C.

10. The spur road is in some sense a red herring. It is a new project, not maintenance of an existing driveway. Under the definitions discussed below, it is clearly the creation of new impervious surface. But at under 2,000 ft.² and outside a critical area buffer, it would not, standing alone, require a permit. The case thus rises and falls entirely on how the driveway is characterized. If the driveway qualifies under either exception, Appellant does not need a permit at all.[3]

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essentially treat "ten business days" as "ten business days, excluding those business days I was in Canada." Today's decision is timely by that second measure.

[3] The less-than-2,000-ft.²-of-impervious-surface exception counts all new impervious surface added on a single site added after January 1, 2005. So if, say, 600 ft.² had been added in 2008, the 1,600 ft.² spur road added in 2016 would trigger a permit. That is not our scenario.

Driveway Maintenance

11. The potential exception Appellant argues is the most the most applicable is "[m]aintenance of driveway or private access road," defined as work "[i]n conjunction with normal and routine maintenance activities."[4] Appellant points us first to KCC 21A.06.731's definition of "maintenance." Where a term is not defined in a code, it is appropriate to look in an analogous code. *See, e.g., Veiga v. McGee*, 26 F.3d 1206, 1211 (2d. Cir. 1994) ("in the absence of a statutory definition of a term, the understanding of that term in an analogous statute is an excellent guide to interpretation"). So Title 21A's definitions are useful to interpreting Title 16's terms.

12. KCC 21A.06.731 does not help Appellant's case, because it defines "maintenance" as:

> the usual acts to prevent a decline, lapse or cessation from a lawfully established condition without any expansion of or significant change from that originally established condition…. "Maintenance" includes repair work but does not include replacement work…..

13. A "significant change from that originally established condition" is thus explicitly excluded. Adding a three to six inch layer of gravel over an entire roadway—a roadway that had not been graveled for decades—qualifies as a significant change.[5] We originally assumed DPER had whited out the roadbed portion of the 2017 aerial photo to illustrate the length and breadth of the road work. Ex. 6 at 1. In reality, the photo is an un-doctored—and dramatic—portrayal of the change, a gleaming new surface reflecting the sun.[6]

14. Moreover, there are two more restrictions on "maintenance": the work must be both "normal and routine." The first of those modifiers is not problematic; no one asserts that Appellant's 2015 work was abnormal. The critical question is whether it is also "routine." The code does not define the term "routine," so we turn to the dictionary. *State v. Barnes*, 189 Wn.2d 492, 496, 403 P.3d 72 (2017).

15. Various dictionaries define the term slightly differently, but the three we consulted each contains two somewhat distinct meanings.[7] One relates to following a customary course of procedure. We will refer to this meaning as not-out-of-the-ordinary. The other relates

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[4]KCC 16.82.051.C.13. The exception is inapplicable where the activity involves an aquatic area used by salmonids, illegally-created impervious surface, and roadway expansion. But there is no salmonid use near the subject property (as Appellant's critical areas designation showed), the driveway was legally created, and Appellant did not (aside from the spur) expand the roadbed.

[5] Appellant clarified that for certain points of the driveway he may have added only an inch, while others perhaps over six inches.

[6] Appellant's citation to *Mower v. King County*, 130 Wn. App. 707, 716, 125 P.3d 148 (2005), is not particularly relevant. First, the court forgot to look at the code for a definition of "maintenance," opting instead for a general dictionary. Second, because Mower's claim was so outlandish and so clearly not maintenance, the court did not need to discuss the "normal and routine" requirement for such "maintenance."

[7] https://www.merriam-webster.com/dictionary/routine?src=search-dict-box ("a regular course of procedure" and the "habitual or mechanical performance of an established procedure"); https://ahdictionary.com/word/search.html?q=routine ("In accord with established procedure" and "Habitual; regular"); https://www.dictionary.com/browse/routine ("a customary or regular course of procedure" and "commonplace tasks…as must be done regularly or at specified intervals; typical or everyday activity").

to something done habitually or at regular intervals. We will refer to this meaning as periodic.

16. Appellant urges us to limit "routine" to the not-out-of-the-ordinary sense. In this denotation, Appellant's work would qualify. There is nothing unconventional about graveling over an historic driveway. Conversely, in the periodic sense, Appellant's work would not qualify. Except for minor repairs Appellant described undertaking over the years—which DPER agrees qualified as "routine"—the road has not been worked on for decades. Appellant's 2015 re-graveling does not qualify under this more restrictive definition. Appellant's argument for a favorable interpretation suffers from both a specific and a general problem.

17. The specific problem is that the not-out-of-the-ordinary denotation reads suspiciously like the definition of "normal." Those same dictionaries cited above define "normal" as "conforming to a type, standard, or regular pattern," "[c]onforming with, adhering to, or constituting a norm, standard, pattern, level, or type," and "conforming to the standard or the common type."[8] Thus, Appellant's reading would render superfluous the "routine" requirement of the "normal and routine maintenance."[9] And we interpret a statute so as not to render a term superfluous. *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 264, 413 P.3d 549 (2018).

18. The general problem is that we must "narrowly construe exceptions to statutory provisions" and must "choose, when a choice is available, a restrictive interpretation over a broad, more liberal interpretation." *City of Union Gap v. Washington State Dept. of Ecology*, 148 Wn. App. 519, 527, 195 P.3d 580 (2008). We thus select the more restrictive interpretation, requiring that work not only be conventional but also undertaken periodically, instead of a once-in-a-generation major overhaul. The "well-established rule is that a defendant who relies on an exception to a statute…has the burden of establishing and showing that he comes within the exception." *State v. Carter*, 161 Wn. App. 532, 542 n.7, 255 P.3d 721 (2011) (quoting *United States v. Green*, 962 F.2d 938, 941 (9th Cir. 1992)). Appellant has not met his burden of proving conformity with the "normal and routine maintenance" exception to the permit requirement.

Impervious Surface

19. The other potentially applicable exception Appellant raises, albeit secondarily, is "[g]rading that produces less than two thousand square feet of new impervious surface on a single site added after January 1, 2005." KCC 16.82.051.C.2.

20. Appellant submitted a previous DPER interpretation of "impervious surface," Exhibit 17, but asked us not to defer to that interpretation. He need not worry. We do not defer to *any* agency interpretation. Beyond the Examiner rule that prohibits us from giving substantial weight or otherwise according deference, because courts "must give substantial deference to both the legal and factual determinations of the hearing examiner as the local authority

[8] https://www.merriam-webster.com/dictionary/normal?src=search-dict-hed; https://ahdictionary.com/word/search.html?q=normal; https://www.dictionary.com/browse/normal?s=t.
[9] The analysis would be different if the code exempted "normal or routine"; then something either standard or periodic would qualify.

with expertise in land-use regulations," we do not abdicate our responsibility by passing the buck to any agency's legal interpretations. *Durland v. San Juan Co.*, 174 Wn. App. 1, 12, 298 P.3d 757 (2012); Exam. R. XV.F.3.

21. Were we to put the burden on Appellant to prove the "under 2,000 ft.² of new impervious surface" exception, and we then applied the normal rule of statutory construction and narrowly construe that exception, Appellants would lose on this ground as well. However we have consistently made a specific modification to the general format as it relates to clearing and grading enforcement.

22. The code's default is that—unless specifically excepted—a person shall not do *any* clearing or grading without first obtaining a clearing and grading permit from DPER. KCC 16.82.050.B. The definition of "grading" is broad, meaning "any excavating, filling or land-disturbing activity, or combination thereof," with "land disturbing activity" itself defined as activity resulting "in a change in the existing soil cover, both vegetative and nonvegetative, or to the existing soil topography." KCC 16.82.020.O & Q. The definition of clearing is even broader, including "the cutting, killing, grubbing or removing of vegetation or other organic material by physical, mechanical, chemical or any other similar means." KCC 16.82.020.D.

23. Thus, anyone who works any ground or vegetation in King County, in almost any manner, would presumptively have "cleared" or "graded." Each person who mows the lawn in the summer, prunes back the hedges in the fall, or adds some gravel to fill in a walkway's wet low spots in the winter, would have the burden to affirmatively demonstrate a narrowly-interpreted exemption to the requirement to obtain a permit. To avoid that absurd result, we have consistently required DPER to assert and then prove either clearing or grading in excess of one of the first three numbered threshold exceptions in KCC 16.82.051.C—excavation over five feet deep/fill over three feet high, adding over 2,000 ft.² feet of new or replaced impervious surface, or cumulative clearing over 7,000 ft.²—or that the clearing or grading was in location or of a nature where the threshold trigger does not apply.[10] That is why DPER here phrased the violation in terms of "Creation of 2,000 sq. ft. of new and/or replaced impervious" without a permit, instead of simply "Grading without a permit."

24. Therefore, in contrast to KCC 16.82.051.C's latter 23 exceptions to the *any*-grading-requires-a-permit rule, when we place the burden on DPER to allege (in a notice) and then to prove (at hearing) that an appellant cleared or graded in excess of one of those three thresholds or in an area or manner where there is no threshold. And we do *not* apply the exceptions-defined-narrowly rule of statutory construction to those first three exceptions. *Cf. Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 269–70, 413 P.3d 549 (2018) (as standard test did not "adequately account for the special circumstances" of a class of cases, Court declined to apply that test to that class of cases).

25. There is no question that the driveway and spur road are both currently "impervious," defined as:

[10] For example, in an aquatic area buffer, none of those three general exemptions apply. KCC 16.82.051.C. So it would be sufficient for DPER to allege (and later prove) clearing and/or grading within an aquatic buffer, with the property owner then having the burden to prove some other exception to the usual permit requirement.

> a hard surface area that either prevents or retards the entry of water into the soil mantle as under natural conditions before development or that causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions before development[,]

and explicitly including "graveled" areas. KCC 9.04.020.Z. There is also no question that Appellant building the spur road created such impervious surface. However, standing alone the spur area is under 2,000 ft.² And unlike the spur road—which was a field before Appellant went to work—the driveway was already "impervious" *before* Appellant added a layer of gravel in 2015.

26. That is not a Get Out of Jail Free card. "Impervious" is not a binary, yes/no, distinction. That a surface already retards water entry or causes increased runoff (as contrasted with ground in its natural condition) does not mean that adding a *more* impervious surface cannot qualify as creating "new impervious surface." The definition of "new impervious surface" is "the creation of impervious surface or the addition of a more compacted surface such as the paving of existing dirt or gravel." KCC 9.04.020.KK (emphasis added). So while a pre-existing gravel surface already qualifies as "impervious," asphalting over that gravel creates "new impervious surface."

27. The problem with DPER's interpretation is that, as block-quoted above, "impervious surface" is measured against "natural conditions" and "natural infiltration." The definition could have contrasted preventing or retarding water entry into the mantle with "pre-development" conditions, or baselined the flow rate to "pre-development" flow rates. In that scenario, we would be comparing the historic driveway as it existed just before Appellant added a layer gravel, with Appellant's overhaul. We would find that Appellant's 2015 driveway re-graveling project at least marginally retarded infiltration into—and increased the flow rate from—a driveway prism that had not been substantially graded in decades. But that is not how that definition is written.

28. Similarly, the definition of "new impervious surface" includes (in addition to creating truly new impervious surface) adding "a more compacted surface such as the paving of existing dirt or gravel." The example implies that the code is getting at differences *in kind* and not simply *in degree*. Unlike graveling over a dirt road or paving over a gravel road, covering a dirt road with more dirt or graveling over a gravel road is not adding a "*more* compacted surface." Instead adding dirt to dirt or gravel to gravel is adding *more of the same* compacted surface.

29. We do not dispute that adding dirt to dirt or gravel to gravel at least slightly retards infiltration and increases flow rates. But that is not how the definitions peg the critical change. And for purposes of the first three exceptions in KCC 16.82.051.C, we do not apply a narrow construction. DPER is free, when it proposes its next omnibus code changes, to get where it wants to go by amending the code. Perhaps KCC 16.82.051.C could be amended. Or KCC 9.04.020.KK could be re-written to define "new impervious surface" to include "…the addition of ((~~a more compacted surface~~)) material that retards infiltration and increases flow rates, such as ((~~the~~)) paving ((~~of~~)) existing dirt or gravel," or "…the addition of a more compacted surface, such as the adding a layer of compacted

material ((~~paving of existing dirt or gravel~~)),” or as something else. But the current code does not get DPER there. DPER has not met its burden.

DECISION:

1. Appellant’s activities do not qualify as “normal and routine maintenance” of a driveway.

2. Appellant’s construction of the spur road created “new impervious surface,” but under 2,000 ft.² of this. Appellant graveling over the pre-existing gravel driveway did not create any “new impervious surface.”

3. In our scenario, qualifying under either exception is sufficient. James Prekeges’ and Ronald Butler’s appeal is therefore GRANTED.

ORDERED August 8, 2018.

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 JULY 17, 2018, HEARING IN THE APPEAL OF JAMES PREKEGES AND RONALD BUTLER, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. ENFR170114 SUPPL

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Peter Ojala, James Prekeges, and LaDonna Whalen.

The following exhibits were offered and entered into the record:

Department-Offered Exhibits

Exhibit no. 1	Department of Permitting and Environmental Review staff report to the Hearing Examiner for file no. ENFR170114 Supplemental
Exhibit no. 2	Supplemental notice and order, issued March 23, 2018
Exhibit no. 3	Notice and statement of appeal, received April 16, 2018
Exhibit no. 4	Codes cited in the notice and order
Exhibit no. 5	Photographs of subject property, dated February 15, 2017
Exhibit no. 6	Aerial photographs of subject property, dated 2015 and 2017

Appellant-Offered Exhibits

Exhibit no. P1	Email exchanges of DPER and James Prekeges, dated February 27, 2017 through February 28, 2017
Exhibit no. P2	Exclusive easement agreement, dated March 30, 2015
Exhibit no. P3	Declaration of easement and road maintenance covenants, dated January 2016
Exhibit no. P4	Aerial photograph of subject property with measurement
Exhibit no. P5	Aerial photograph of subject property, dated 2013, 2012, 2009, 2007, 2017, 2005, 2002, 2000, 1998, and 2015
Exhibit no. P6	Public Health final well site approval no. SR1388345, dated September 27, 2016
	A. Public Health final well site approval no. SR1388345, dated September 27, 2016
Exhibit no. P7	DPER grading permit FAQs
Exhibit no. P8	DPER information bulletin no. 28 on clearing and grading permits
Exhibit no. P9	Photograph of subject property
Exhibit no. P10	Photograph of subject property
Exhibit no. P11	Photograph of subject property
Exhibit no. P12	Letter from DPER to Weed, Graadstra & Associates Inc with grant of civil penalty waiver request, dated April 6, 2018
Exhibit no. P13	Email exchanges of DPER and James Prekeges, dated February 27, 2018 through February 28, 2017
Exhibit no. P14	Waiver request for DPER file no. ENFR170114, dated March 5, 3028
Exhibit no. P15	Addendum to critical areas designation no. CADS130046 and CADS130047, dated May 22, 2014
Exhibit no. P16	Excerpts of King County Codes
Exhibit no. P17	Preliminary code interpretation for Department of Development and Environmental Services file no. L03CI005, dated January 16, 2004

DS/ed

August 8, 2018

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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR170114 Supplemental**

JAMES PREKEGES AND RONALD BUTLER
Code Enforcement Appeal

I, Vonetta Mangaoang, 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 August 8, 2018.

Vonetta Mangaoang

Vonetta Mangaoang
Senior Administrator

Breazeal, Jeri
Department of Permitting and Environmental Review

Deraitus, Elizabeth
Department of Permitting and Environmental Review

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