



King County

Department of Permitting and Environmental Review

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FINAL CODE INTERPRETATION CINT17-0001 (Koler)

Background

Ms. Jane Ryan Koler filed a code interpretation request on June 29, 2017. The request seeks clarification on (1) what events trigger establishment of a critical area buffer; (2) whether individuals who have no construction activity on their land establishing such a buffer are prohibited from making ordinary residential use of their land; and (3) whether nonconforming rights to make use of residential yards prevent the County from demanding restoration of buffers when they have simply been making ordinary use of their residential property and have engaged in no construction or development activity that caused the designation of a buffer on their 1950s/1960s-era residential yards.

These questions are being raised because of several cases Ms Koler is working on in which the County has alleged that her clients cannot do ordinary site work on their properties because they are within wetland buffers or aquatic buffers. While a specific case is not identified in this request, Ms. Koler has provided examples from one of her cases to provide further context to her questions.

Discussion

King County's critical area regulations adopted pursuant to Washington State's Growth Management Act have been in effect since November 1990. The last major revisions to these regulations were adopted in 2004 and became effective on January 1, 2005. These regulations are unequivocal in their broad application to the residents of King County. As noted in K.C.C. 21A.24.020, these regulations apply to all land uses in King County and all persons within the county shall comply with these regulations.

Critical areas are broadly defined as any area that is subject to natural hazards or a land feature that supports unique, fragile or valuable natural resources including fish, wildlife or other organisms or their habitats or such resources that carry hold or purify water in their natural state. Critical areas include, but are not limited to, wetlands and aquatic areas. Similarly, wetland and aquatic area buffers also exist naturally. The exact size of the buffer is a function of the classification of the wetland or aquatic area which are defined in the critical area regulations. These features exist in nature and by definition and are not created or designated by any specific action.

Alterations are broadly defined in K.C.C. 21A.06.056 as:

any human activity that results or is likely to result in an impact upon the existing condition of a critical area or its buffer. "Alteration" includes, but is not limited to, grading, filling, dredging, channelizing, applying herbicides or pesticides or any hazardous substance, discharging pollutants except stormwater, grazing domestic animals, paving, constructing, applying gravel, modifying topography for surface water management purposes, cutting, pruning, topping, trimming, relocating or removing vegetation or any other human activity that results or is likely to result in an impact to existing vegetation, hydrology, fish or wildlife or their habitats. "Alteration" does not include passive recreation such as walking, fishing or any other similar activities.

Within wetlands, aquatic areas and their buffers, only the alterations listed in K.C.C. 21A.24.045.C are allowed provided the alteration complies with all of the conditions listed in K.C.C. 21A.24.045.D. If an alteration is not allowed or the alteration does not comply with the conditions in 045.D, an alteration exception may be obtained under K.C.C. 21A.24.070.

Maintenance of lawn, landscaping or garden for personal consumption is an allowed alteration within wetlands, aquatic areas or their buffers providing the maintenance is occurring within existing landscaped areas. Maintenance of existing lawns and landscaping within critical areas also does not require permits provided the activities being undertaken are normal and routine maintenance activities, the landscaping was lawfully established and landscaped area is not expanded. or other previously disturbed areas. What constitutes normal and routine landscape maintenance was the subject of several previous code interpretation.¹ Normal and routine maintenance is generally viewed as commonplace activities carried out at regular intervals to provide upkeep or support. A lawn would be weeded, trees and shrubs trimmed. Repair and maintenance activities are generally intended to keep a structure or site alteration in its lawfully established condition.

In a more recent review by the Regulatory Review Committee, the concept of normal and routine maintenance and repair of residential landscaping was expanded to include certain modification to landscaped areas.² For example, converting a lawn to a vegetable garden or vegetable garden to lawn are commonplace activities, especially in rural areas, and are highly dependent on the personal preferences of the property owner. It was also recognized these preferences change over time as ownership changes or individual circumstances change. The informal position of the department was that as long as the work was not expanding the landscaped area, the commonplace activities that were occurring would not require permits as long as they were generally in-kind activities and were not creating additional impacts on critical areas. Pervious surfaces, such as lawns, could be swapped out for other pervious surfaces, such as a vegetable garden. Shrubs, trees and other forms of landscaping could be replanted with different forms of landscaping. Landscaped areas, however, could not be replaced with impervious surfaces.

¹ Administrative Interpretation Number 12, Normal and Routine Maintenance, August 30, 1994

² Regulatory Review Committee Minutes, March 5, 2015

Ms. Koler also asserts that retroactively applying critical area regulations to properties that were developed in the 1950's runs afoul of the protection of nonconforming uses and structures recognized by Washington's courts. As noted above, King County's regulations allow for continuance of uses, structures and site improvements that are nonconforming to King County's critical area regulations. There are also provisions in K.C.C. 21A.24.045 and 21A.32 that allow for certain modifications and even expansions of these nonconforming uses, structures or site improvements.

Decision

The activities that have been undertaken by Ms. Koler's clients are beyond what is considered normal and routine landscape maintenance. These include adding hardscaping, filling, clearing and grading to expand parking and landscaped areas, creation of new or replaced impervious surfaces, construction of residential accessory structures and similar related alterations, all occurring within regulated critical areas. Unless these alterations are allowed under K.C.C. 21A.24.045.C and D, or an alteration exception is obtained under K.C.C. 21A.24.070, these alterations will have to be removed and the property restored to its pre-disturbance condition.

Finality of Code Interpretations

Under K.C.C. 2.100.050.A, the director's decision on a code interpretation is final. A code interpretation issued by the director governs all staff review and decisions unless withdrawn or modified by the director or modified or reversed on appeal by the King County Hearing Examiner, King County Council or an adjudicatory body (K.C.C. 2.100.040.H).



John F. Starbard, Director
Department of Permitting and Environmental Review



Date