

June 9, 2014

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**
400 Yesler Way, Suite 240
Seattle, Washington 98104
Telephone (206) 477-0860
Facsimile (206) 296-0198
hearingexaminer@kingcounty.gov

REPORT AND DECISION

SUBJECT: Permitting and Environmental Review File No. **ENFR120469 (Penalty)**

CHRISTINE WALDEN
Civil Penalty Waiver Appeal

Location: 37500 SE 191st Street, Maple Valley

Appellants: **Christine&Dean Walden**
PO Box 332
Hobart, WA 98025
Telephone: (206) 715-1201

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:	Grant in part, deny in part

EXAMINER PROCEEDINGS:

Hearing Opened:	June 3, 2014
Hearing Closed:	June 3, 2014

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.

FINDINGS, CONCLUSIONS AND DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. Ordinance 17591, adopted in May 2013, amends the civil penalty appeal procedures set out in Chapters 23.02 and 23.32 KCC. Under the new process, a person responsible for code compliance must file a penalty waiver request before bringing an appeal of the civil penalty. In addition, Ordinance 17591 adds as a ground for bringing an appeal "any other reasons why the person believes the penalties are erroneous or excessive under the circumstances." KCC 23.32.100(B)(4). *See also*, KCC 23.32.110.
2. On June 20, 2013, the Department of Permitting and Environmental Review ("DPER") issued a Notice of King County Code Violation ("Notice and Order") to Christine J. Walden, alleging construction of a single family residence and storage shed without required permits, inspections, and approvals. Exhibit ("Ex.") 2. The property subject to the Notice and Order is located 37500 SE 191st Street, Maple Valley, in unincorporated King County. Christine Walden is the owner.
3. Christine Walden timely appealed the Notice and Order on behalf of herself and her husband, Dean Walden. Both Waldens are disabled. As the Examiner found in her Report and Decision ("Decision") on the Code Enforcement Appeal, the Waldens presented persuasive evidence that that they do not have the financial wherewithal to apply for and obtain the required permits, inspections, and approvals. However, as they did not contest the fact that the residence and storage shed were constructed without permits, the Examiner denied their appeal.
4. As the first step in achieving compliance, the Decision required the Waldens to submit an application for a critical areas determination ("CAD") within 60 days of the Decision, November 4, 2013. As of June 3, 2014, they had not yet applied for a CAD. (Testimony of Officer Sawin).
5. On January 10, 2014, DPER assessed civil penalties for 60 days. The penalties, totaling \$5,850, are based on 30 days charged at \$65/day and an additional 30 days at \$130/day. The \$65/day is comprised of \$25 basic penalty + \$15 public health risk + \$25 economic benefit. Ex. 4. The second 30 days were assessed at double the rate for the first 30 days pursuant to KCC 23.32.010(B). (Testimony of Officer Sawin).

6. The Waldens timely requested a waiver of the civil penalties, referencing a letter which is not included in the record before the Examiner and explaining, as they had at the hearing on their appeal of the Notice and Order, that they are trying to sell the property, but are impeded by the violations clouding title. Ex. 4. DPER denied the request. Ex. 4.
7. The Waldens timely appealed DPER's denial of their waiver request, stating that they have no money or any way of generating any. Ex. 3.
8. KCC 23.32.010(A)(1)(b)(2) provides that a basic civil penalty of \$25/day "shall" be assessed for each violation identified in a notice and order. Subsection (A)(1)(b)(3) then provides that additional penalties "may" be added when one or more of seven specified factors is present. Under principles of statutory construction, the juxtaposition of "shall" and "may" means that the basic penalty is mandatory; the additional penalties are discretionary. Here, DPER has assessed additional penalties for public health risk and economic benefit to the person responsible for the violation. DPER may assess these additional penalties where the identified risk and benefit, respectively, are present.
9. Interpretation of the applicability of the KCC 23.32.010(A)(1)(b)(3) factors appears to be a matter of first impression for this Office. KCC 23.32.110 places the burden on the appellant to demonstrate "by a preponderance of the evidence that the civil penalties were assessed after achieving compliance or that the penalties are otherwise erroneous or excessive under the circumstances." Therefore, the Examiner will accord DPER a rebuttable presumption that the risk or benefit alleged is present and that an appellant may overcome that presumption by a preponderance of the evidence.
10. Officer Sawin testified that the additional penalty for public health risk is based on the fact that the septic system has not been permitted. In essence, DPER's position is that an unpermitted septic system is *per se* a public health risk. Officer Sawin testified that DPER has no evidence that the septic system on the property is failing. Mr. Walden testified that the septic system is properly functioning. The record in the appeal of the Notice and Order indicates that DPER first issued a Notice and Order in 1996 for the violations alleged in the 2013 Notice and Order which resulted in this civil penalty waiver appeal. The septic system has apparently been operating without issue since at least 1996. Under the circumstances of this case, the Waldens have overcome any rebuttable presumption that an unpermitted septic system is *per se* a public health risk. The added penalty for public health risk is erroneous.
11. Officer Sawin testified that the additional penalty for economic benefit is based on the fact that a house is located on the property. On questioning by the Examiner, she testified that this factor would be present in any case in which a structure was the subject of a Notice and Order the violation of which resulted in civil penalties. Thus, as with the

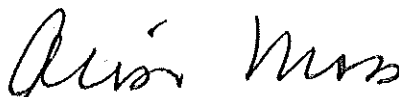
public health risk, DPER's position is that an unpermitted structure *per se* provides an economic benefit. The records in this appeal and the appeal of the Notice and Order indicate that the Waldens have been trying to sell the property for a number of years but have been unable to do, in part, to the cited violations and lien on the property. Under the circumstances of this case, the Waldens have overcome any rebuttable presumption that an unpermitted structure *per se* provides an economic benefit. The added penalty for economic benefit is erroneous.

DECISION:

The appeal is granted in part and denied in part. The penalties are reduced to \$2,250.00, calculated as follows:

A.	Notice and Order Basic Penalty (\$25 x 30 days) =	\$ 750.00
B.	Second 30 days (\$750 x 2) =	<u>1,500.00</u>
	Total	\$ 2,250.00

ORDERED June 9, 2014.



Alison Moss
Hearing Examiner pro tem

NOTICE OF RIGHT TO APPEAL

Pursuant to King County Code Chapter 20.24, the King County Council has directed that the Examiner make the final decision on behalf of the county on these appeal matters. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in superior court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE JUNE 3, 2014, HEARING IN THE APPEAL OF Christine Walden, PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. ENFR120469 (PENALTY).

Alison Moss was the Hearing Examiner in this matter. Holly Sawin participated in the hearing on behalf of the department and Dean and Christine Walden, the Appellants.

The following exhibits were offered and entered into the record:

- | | |
|---------------|---|
| Exhibit no. 1 | Permitting and Environmental Review staff report to the Hearing Examiner for file no. ENFR120469 (Penalty). |
| Exhibit no. 2 | Notice and Order, issued June 20, 2013 |

Exhibit no. 3 Notice and Statement of Appeal, received April 7, 2014
Exhibit no. 4 DPER Civil Penalty Waiver letter dated March 19, 2014

AM/gao

June 9, 2014

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CERTIFICATE OF SERVICE

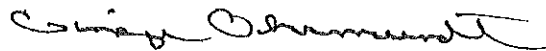
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CHRISTINE WALDEN
Civil Penalty Waiver Appeal

I, Ginger Ohrmundt, 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 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 at the addresses indicated on the list attached to the original Certificate of Service.
- caused to be placed with the United States Postal Service, with sufficient postage, as **CERTIFIED MAIL** with a return receipt requested in an envelope addressed to the primary parties.

DATED June 9, 2014.



Ginger A. Ohrmundt
Legislative Secretary II

All Parties of Record

Deraitus, Elizabeth

Department of Permitting and Environmental Review
35030 SE Douglas Street Suite 210

Snoqualmie WA 98065

Lux, Sheryl

Department of Permitting and Environmental Review
35030 SE Douglas Street Suite 210

Snoqualmie WA 98065

Sawin, Holly

Department of Permitting and Environmental Review
35030 SE Douglas Street Suite 210

Snoqualmie WA 98065

Walden, Christine&Dean

PO Box 332

Hobart

WA 98025
mailed paper copy

Williams, Toya

Department of Permitting and Environmental Review
35030 SE Douglas Street Suite 210

Snoqualmie WA 98065