

May 7, 2018

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review file no. **E0400239**

GEORGE AND RUTH WAHL
Civil Penalty Waiver Appeal

Location: 74406 NE Old Cascade Highway, Skykomish

Appellants: **Cheryl Wahl and Henry Sladek**
PO Box 144
Skykomish, WA 98288
Telephone: (425) 418-5545
Email: hsladek@msn.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
Email: ladonna.whalen@kingcounty.gov

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Grant appeal in part, deny appeal in part

EXAMINER PROCEEDINGS:

Hearing Opened:	April 12, 2018
Hearing Record Closed:	April 23, 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:

1. On July 25, 2017, the Department of Permitting and Environmental Review (DPER) issued a notice and order (Order) to George and Ruth Wahl, asserting (1) accumulation of inoperable vehicles and vehicle parts, (2) rubbish, salvage and debris, (3) occupancy of a substandard dwelling (RV), (4) construction of accessory structures without the proper permits, (5) grading in excess of the permit thresholds, and (6) clearing in excess of the permit thresholds. Ex. 6.
2. The Order provided an August 18 appeal deadline, followed by an August 25 deadline to
 - (1) remove the inoperable vehicles and vehicle parts, (2) remove the rubbish, salvage and debris, (3) vacate the RV, and
 - submit a complete application or prescreening meeting request to begin the permit process to legalize the (4) accessory structures, (5) grading, and (6) clearing.

The Order explained the \$40–65 per-day, per-violation penalties for the first 30 days, doubling (to \$80–130 per-day, per-violation) for each day after that.

3. The Wahls’ daughter and son-in-law (Appellants) picked up the Order in mid-August, but elected not to file an appeal. They did contact DPER. In mid-September, Ofc. LaDonna Whalen wrote that she could not extend the Order’s August 25 deadlines, but she would hold off her inspection until about October 25. Ex. 9. In fact, she held off a little longer than that, visiting the site again on November 13. Ex. 4. On December 1, DPER issued \$24,900 in penalties—two months’ worth for each violation. Ex. 2 at 002.
4. Appellants requested a penalty waiver, which DPER’s director denied in February 2018. Ex. 2. Appellants timely appealed the penalty waiver denial later that month. Ex. 3. We went to hearing in April, and then held the record open for some post-hearing supplementation. Submittals complete, we now analyze that record.
5. In a penalty appeal the burden is “on the appellant to demonstrate by a preponderance of the evidence that civil penalties were [a] assessed after achieving compliance or that the penalties are [b] otherwise erroneous or [c] excessive under the circumstances.” KCC 23.32.110. In addition, in “an appeal of the assessment of civil penalties, the appellant may not challenge findings, requirements or other items that could have been challenged during the appeal period for a...notice and order.” KCC 23.32.120.A.
6. A thrust of Appellant’s February 2018 appeal statement was that DPER’s compliance deadlines were “imminently unreasonable to begin with.” Ex. 3. That is, at the point

DPER issued its July 25 Order, it was unreasonable for DPER to set August 25 as the compliance deadline. In many notice and order appeals, the *only* issue being appealed is the compliance deadline: the appellant agrees there is a violation that needs remedying and does not dispute the nature or scope of DPER’s ordered remedy, instead simply challenging whether it is reasonable to accomplish that remedy within DPER’s timeframe. We have often sided with an appellant in such appeals, significantly extending the pertinent compliance deadline.

7. However, that challenge needed to be raised by the August 18 deadline. Ex. 6 at 004. As the code quoted above clarifies, an appellant may not challenge a requirement that could have been challenged during a notice and order’s appeal period. KCC 23.32.120.A. Thus the August 25 compliance deadline DPER set in its July 25 Order was not, as a matter of law, [b] “erroneous.”
8. We next analyze whether any of the penalties for any of the six violations were [a] “assessed after achieving compliance.” The deadline—or more accurately, the first deadline in a series of deadlines—for legalizing the (4) accessory structures, (5) grading, and (6) clearing violations involved submittals to begin the permitting process. And Appellants did submit their ABC pre-application meeting request packet to DPER on November 22, 2017.
9. From DPER’s perspective, Appellants’ November 22 submittal was too late to qualify, both because DPER assessed penalties covering the late August through late October period and because DPER made the decision to assess penalties at a November 13 site visit. As KCC 23.32.110 clearly pegs our review to whether the “civil penalties were assessed after achieving compliance,” the date of assessment—not the time period the penalty covered—is the critical date.
10. That leaves the question of whether DPER “assessed” penalties on the date DPER visited the site and determined that penalties were warranted (November 13, nine days *before* Appellant’s November 22 submittals), or on the date DPER actually issued the penalty invoice (December 1, nine days *after* Appellant’s November 22 submittals). Not being defined by code nor a term of art, we look to a dictionary definition of “assess,” which has at least two relevant meanings: to “determine” an amount of something (here, November 13) or to “impose” something (here, December 1). See <https://www.merriam-webster.com/dictionary/assess>.
11. In our context December 1 has to be the pertinent date. That is the date DPER actually issued its official decision—the penalty invoice. It is this “service of the invoice” from which recipients have 24 days to “request a waiver from the director of some or all of the penalties.” KCC 23.23.040. That DPER may have made up its mind earlier than November 22 to issue penalties is not dispositive.
12. Appellants’ initial permit submittal was only the first of several required permit steps, and so penalties may later be warranted if Appellants do not timely follow-through. But as of the December 1 date on which DPER assessed penalties, Appellants had achieved the “compliance” (in the form of a permit request) the Order required. As of December 1,

the permitting ball was DPER's court. Thus DPER was premature to assess the \$11,700 in penalties attributable to violations (4), (5), and (6).¹


13. Appellants did not get the (3) RV into compliance until December 15. Ex. 10. And while DPER agreed that Appellants have been making progress towards the (1) inoperable vehicles and vehicle parts and (2) rubbish, salvage and debris, compliance had not been achieved by our April 2018 hearing, let alone before December 2017. So the \$13,200 in penalties attributable to these three violations were assessed before Appellants achieved compliance.
14. That leaves us to decide whether Appellants have met their burden to show that such penalties are [b] "excessive under the circumstances," KCC 23.32.110, and if so by how much. 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.
15. Deadlines matter, and in determining whether they were better off to try to do all the work themselves (on their own schedule) or to hire someone to do the work on a more expedited basis, Appellants had the penalty schedule in front of them, plus DPER unequivocal statement that they could incur penalties if not completed by October 25. Appellants made a choice, and choices have consequences.
16. Still, Appellants came within about two weeks of the penalty assessment date for bringing the (3) RV into compliance, and DPER estimated that Appellants have cleaned up between 25 and 40 percent of the (1) inoperable vehicles/vehicle parts and (2) rubbish salvage and debris. Those accomplishments are worth something. Phrased another way, if Appellants had taken zero steps to comply with the first three violations, the penalty would have been \$13,200. Thus, something less than that seems appropriate here. There is no magic formula to apply, but given the steps Appellants have taken and are continuing to take, they have met their burden of showing a \$5,000 reduction is warranted.

DECISION:

1. As to \$11,700 in penalties attributable to violations (4) accessory structures, (5) grading, and (6) clearing, Appellants' appeal is **GRANTED**, in that these were assessed after Appellants' had accomplished the first required permitting step contained in DPER's Order.
2. As to the \$13,200 in penalties attributable to violations (1) inoperable vehicles and vehicle parts, (2) rubbish, salvage and debris, and (3) RV, Appellants' appeal is **PARTIALLY GRANTED** as to \$5,000 of the penalty and **PARTIALLY DENIED** as to the remaining \$8,200.

¹ Ex. 2 at 002 helpfully breaks down the penalties-per-violation.

ORDERED May 7, 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 APRIL 12, 2018, HEARING IN THE APPEAL OF GEORGE AND RUTH WAHL, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. E0400239

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were LaDonna Whalen and Henry Sladek.

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. E0400239
- Exhibit no. 2 Letter from DPER to Cheryl Wahl with civil penalty waiver denial, dated February 8, 2018
- Exhibit no. 3 Notice and statement of appeal, received February 26, 2018
- Exhibit no. 4 Photographs of subject property, dated November 13, 2017
- Exhibit no. 5 Aerial photographs of subject property, dated 2015, 2009, 2007, and 2002
- Exhibit no. 6 Notice and order, issued July 25, 2017
- Exhibit no. 7 Civil penalty waiver request, dated December 21, 2017
- Exhibit no. 8 Photographs of subject property, dated March 22, 2018
- Exhibit no. 9 Email from DPER to Cheryl and Henry Wahl with deadline information, dated September 12, 2017

The following exhibit was offered and entered into the record on April 18, 2018:

- Exhibit no. 10 Letter from Mark Pollow, dated April 17, 2018

The following exhibit was offered and entered into the record on April 23, 2018:

- Exhibit no. 11 Response from DPER

DS/ed

May 7, 2018

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **E0400239**

GEORGE AND RUTH WAHL
Civil Penalty Waiver 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 May 7, 2018.

Vonetta Mangaoang

Vonetta Mangaoang
Senior Administrator

Breazeal, Jeri

Department of Permitting and Environmental Review

Cheryl Wahl, Henry Sladek

Hardcopy

Deraitus, Elizabeth

Department of Permitting and Environmental Review

Lux, Sheryl

Department of Permitting and Environmental Review

Wahl, George and Ruth

Hardcopy

Whalen, LaDonna

Department of Permitting and Environmental Review

Williams, Toya

Department of Permitting and Environmental Review