

November 21, 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. **E1000187**
(Penalty)

NANCY ANN PIERCY AND MONIQUE HANSEN
Civil Penalty Waiver Appeal

Location: 28039 Summerhurst Walk SW, Vashon

Appellant: Nancy Ann Piercy
represented by **John Piercy**
126 Amherst Street
Fircrest, WA 98466
Telephone: (253) 735-1100
Email: piercyfamily@comcast.net

Appellants: **Monique and Charles Hansen**
25927 Gold Beach Drive SW
Vashon, WA 98070
Telephone: (253) 732-1262
Email: susiecharliehansen@gmail.com

King County: Department of Permitting and Environmental Review
represented by **Nick Stephens**
35030 SE Douglas Street Suite 210
Snoqualmie, WA 98065
Telephone: (206) 477-3950
Email: nick.stephens@kingcounty.gov

SUMMARY OF RECOMMENDATIONS/DECISION:

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

EXAMINER PROCEEDINGS:

Hearing Opened:	November 13, 2018
Hearing Closed:	November 13, 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:

Background

1. Nancy Ann Piercy and Monique Hansen (Appellants) are the record owners of Parcel no. 776220-0065, a 0.19-acre property in the RA-2.5 zone on Vashon Island, the address of which is 28039 Summerhurst Walk SW (Property).
2. This case originated in 2010 when, in response to a complaint regarding construction of buildings attached to a single-family septic system without the required permits, the Department of Permitting and Environmental Review (DPER) conducted a site inspection. During the March 25, 2010, site inspection, DPER found that a second story had been removed and a single-story addition, and structural repairs, including a new foundation, had been made to a beach cabin (Building A) and that an accessory structure (Building B) originally constructed in approximately 1962 had been demolished and a new accessory structure had been constructed.
3. On March 22, 2010, DPER sent Ms. Piercy a letter confirming the violations, providing a compliance schedule, and advising of the opportunity to enter into a voluntary compliance agreement. Among other things, the letter advised that the property owners must apply for a building permit pre-application meeting and submit a complete application to the Health Department for septic system approval within 30 days of the pre-application meeting and a complete building permit application to DPER within 30 days of Health Department approval. Exhibit 8.
4. On May 6, 2010, Ms. Piercy attended a pre-application meeting with DPER at which DPER again made her made aware that the owners would need to obtain septic approval from the Health Department prior to submitting a building permit application.

5. On August 25, 2015, DPER issued a Notice and Order to Appellants alleging that the following actions had taken place within specified environmentally critical areas and/or or buffers (erosion, wetland, aquatic, shoreline, FEMA 100 year floodplain, critical aquifer recharge areas) and without required permits in violation of a number of referenced provisions of the King County Code (KCC): (1) construction and/or structural repair of a residence; (2) construction of an accessory structure; and (3) grading (cut into the slope, fill over 3 feet in height). For alleged Violations 1 and 2, the Notice and Order also alleged that the work required permits under the International Building Code (IBC). Exhibit 4. The Notice and Order advised that, if Appellants did not correct the alleged violations by the dates specified in the Notice and Order, penalties would accrue as follows:

Violation 1: \$80/day for the first 30 days; \$160.00 per day each day thereafter;

Violation 2: \$65/day for the first 30 days; \$130.00 per day each day thereafter;

Violation 3: \$55/day for the first 30 days; \$110.00 per day each day thereafter.

Exhibit 4.

6. Appellants timely appealed the Notice and Order. Rather than proceeding directly to an appeal hearing, from 2015 to 2017, with the concurrence of DPER, the Hearing Examiner held seven status conferences. During this time Appellants made virtually no progress on resolving the alleged violations.
7. The Hearing Examiner held the appeal hearing on September 26, 2017, and on October 4, 2017, largely denied their appeal.¹ She ordered that no penalties be assessed if Appellants took the following actions by the following deadlines:
- A. For Violations 1 and 2: By November 6, 2017 Appellants submit either: (a) a complete application to the Health Department; or (b) a complete application to DPER for a demolition permit to remove the new construction.
 - B. For Violation 3: Submit a pre-screening request to DPER within 30 days of Health Department approval for Violations 1 and/or 2 or by November 7, 2017 if Appellants elected to remove the new construction; and submit a complete clearing permit application within 45 days of the pre-screening meeting.

Exhibit 5.

8. On November 7, 2017, Appellants requested from DPER an extension of 60 days. DPER agreed to an extension to January 5, 2018, with the stipulation that DPER would assess penalties for 60 days of noncompliance if Appellants had not submitted an application to the Health Department by January 5, 2018. Exhibit 2.

¹ The Examiner granted in part their appeal of Violation 3, finding that DPER had not borne its burden of showing by a preponderance of the evidence that Appellants undertook grading in erosion, wetland, FEMA 100 year floodplain, and/or critical aquifer recharge areas and/or buffers.

9. As of January 11, 2018, Appellants had not submitted an application to the Health Department, had not applied for a demolition permit, and had not applied for a clearing permit. Exhibits 1 and 2. DPER assessed penalties for 60 days of noncompliance in the amount of \$18,000 based on the penalty amounts specified in the Notice and Order. Exhibits 1 and 2.
10. Appellants timely requested a waiver, Exhibit A1, contending that they had complied with all requirements within their power and had acted in good faith. DPER denied the waiver as the violations had not been resolved at the time of the waiver request. Exhibits 1 and 2. While KCC 23.32.050.B and .C provide several bases for waiver, DPER was apparently referring to KCC 23.32.050.C.2, which provides that the DPER Director, with the concurrence of the Director of the Department of Executive Services, may waive the civil penalties in whole or in part if the code violations which form the basis for the civil penalties have been cured and the Director finds compelling reasons to justify waiver of all or part of the outstanding civil penalties.
11. DPER also filed a Claim of Lien for the penalties. Exhibit 7.

The Current Appeal

12. Appellants timely appealed the denial of the penalty waiver, contending that DPER failed to consider progress they had made with the Health Department and their cooperation and had imposed an unrealistic deadline to submit a Health Department application. Exhibit 3. They also cite KCC 23.02.070 for the proposition that compliance deadlines are “guidelines” and indicate a desire to enter into a voluntary compliance agreement pursuant to KCC 23.02.090.E.
13. Neither code provision cited by Appellants is applicable. KCC 23.02.070.C provides that the guidelines in that section of the warnings, notifications, and reinspections are not jurisdictional. It does not by its plain language apply to the issuance of a Notice and Order. In this case, DPER found violations (KCC 23.02.070.A), issued a warning letter (KCC 23.02.070.B), and, more than five years later, issued a Notice and Order (KCC 23.02.070.F). Appellants appealed the Notice and Order, which the Hearing Examiner largely upheld providing specific dates for compliance in order to avoid penalties. KCC 23.02.090 governs the voluntary compliance agreements which may be entered into before an appeal is decided pursuant to Chapter 20.22 KCC. In this case, the appeal has been decided and the penalties imposed because Appellants did not comply with the deadlines contained in the Hearing Examiner’s decision or the 60 day extension granted by which DPER agreed.
14. Appellants sought to appeal the lien to the Hearing Examiner. The Hearing Examiner does not have jurisdiction to hear appeals of liens and, therefore, does not address the propriety of the lien. KCC 20.22.040, which specifies matters in which the Hearing Examiner renders final decisions, does not include appeals of liens. At the hearing in this matter, Appellants referred to KCC 20.22.040.EE and Ordinance 13263, referenced in the Claim of Lien. KCC 20.22.040.EE provides that the Hearing Examiner shall issue final decisions on “other applications or appeals that are prescribed by ordinance.”

Section 43 of Ordinance 13263, codified at KCC 23.36.010, provides for appeals of citations, notices and orders, stop work orders, determinations to enter into a voluntary compliance agreement, and determinations not to take enforcement actions.² It does not provide for an appeal of a lien.

15. At the hearing in this matter, Appellants contended that they had “no ability to go faster” and that “no one could accomplish this difficult project in 90 days.” Appellants seem to have “started the clock” for compliance on the date the Hearing Examiner issued her decision on their appeal of the Notice and Order. However, Appellants have had more than eight years since the March 22, 2010, warning letter to submit either a complete application to the Health Department for septic system approval or a complete application to DPER to demolish the unpermitted construction.
16. Appellants offered an October 17, 2017, contract for consulting services related to potential design of an on-site wastewater treatment and dispersal system. Exhibit 3. The Hearing Examiner offers a few observations. First, this contract is not for design of the system but for the potential “develop[ment] of a scope of work and fee proposal for moving forward with design.” Second, Appellants took nearly three weeks to sign this contract, executing it on November 6, 2017, the day before the deadline to submit a complete application to the Health Department. Third, they did not obtain this proposal for more than six and a half years after the March 22, 2010, warning letter.
17. Appellants also offered a July 24, 2018, contract from ADC for the design of a sewage holding tank system. Appellants took 30 days to execute this contract. Exhibit A1, pages 21-22. As of the date of hearing in this matter, November 13, 2018, more than one year after the deadlines provided in the Hearing Examiner’s Report and Decision for avoiding penalties, Appellants had still not submitted an application to the Health Department.
18. The burden is on the Appellants to demonstrate by a preponderance of the evidence that the civil penalties were assessed after they achieved compliance or that the penalties are otherwise erroneous or excessive under the circumstances. KCC 23.32.110.
19. Appellants do not contend that they have achieved compliance.
20. The facts of this case do not demonstrate that the penalties are erroneous or excessive under the circumstances. DPER and the Hearing Examiner have afforded Appellants numerous opportunities and an extended timeframe to submit either a complete application to the Health Department for septic system approval or a permit to DPER for demolition of unpermitted construction. DPER assessed the penalties more than seven and a half years after it first advised the Appellants that they needed to submit either a complete application for Health Department (septic system approval) or DPER (demolition), nearly two and a half years after it issued its Notice and Order which directed Appellants to submit a complete application to the Health Department (septic system approval) or DPER (demolition) within 30 days of the Notice and Order and advised of the penalties that would be assessed if compliance was not achieved by

² KCC 20.36.020 has subsequently been amended to provide only for citations, notices and orders, and stop work orders.

specified deadlines, and nearly two months after the deadline specified in the Hearing Examiner's October 4, 2017, Report and Decision.

DECISION:

1. The appeal is DENIED.

ORDERED November 21, 2018.

Alison Moss
Hearing Examiner pro tem

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 NOVEMBER 13, 2018, HEARING IN THE APPEAL OF
NANCY ANN PIERCY AND MONIQUE HANSEN, DEPARTMENT OF
PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. E1000187
(PENALTY)**

Alison Moss was the Hearing Examiner in this matter. Participating in the hearing were Nick Stephens, Jeri Breazeal, Monique Hansen, and Charles Hansen.

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 |
| Exhibit no. 2 | Authorization for waiver/adjustment of civil fees/civil penalties, dated March 28, 2018; and
Letter from DPER to Monique Hansen and Nancy Ann Piercy with civil penalty waiver request denial, dated April 9, 2018 |
| Exhibit no. 3 | Appeal, received April 26, 2018 |
| Exhibit no. 4 | Notice and order, issued August 25, 2015 |
| Exhibit no. 5 | Hearing Examiner report and decision, dated October 4, 2017 |
| Exhibit no. 6 | Codes cited in the notice and order |
| Exhibit no. 7 | Claim of lien on subject property, recorded February 23, 2018 |

Exhibit no. 8 Letter from Department of Development and Environmental Services to Nancy Piercy with violations, dated March 22, 2010

Appellant-offered exhibits

Exhibit no. A1 Civil penalty waiver requests, dated February 2, 2018 through October 31, 2018

Exhibit no. A2 Title insurance for subject property, effective April 6, 2010

Exhibit no. A3 Correspondence between Charles and Monique Hansen and DPER with settlement agreement discussions, dated May 7, 2018 through September 26, 2018

Exhibit no. A4 Correspondence between Charles and Monique Hansen and Hearing Examiner's Office with request for continuance, dated September 8, 2017 through September 14, 2018

Exhibit no. A5 Civil penalty waiver appeal transmittal

Exhibit no. A6 Ordinance 18230

AM/ld

November 21, 2018

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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **E1000187**
(Penalty)

NANCY ANN PIERCY AND MONIQUE HANSEN
Civil Penalty Waiver Appeal

I, Liz Dop, 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.
- 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 November 21, 2018.



Liz Dop
Legislative Secretary

Breazeal, Jeri

Department of Permitting and Environmental Review

Deraitus, Elizabeth

Department of Permitting and Environmental Review

Hansen, Monique/Charles

Hardcopy

Lux, Sheryl

Department of Permitting and Environmental Review

Piercy, John

Hardcopy

Piercy, Nancy Ann

Hardcopy

Stephens, Nick

Department of Permitting and Environmental Review

Williams, Toya

Department of Permitting and Environmental Review