

January 15, 2019

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

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**REPORT AND DECISION**

SUBJECT: Department of Local Services, Permitting Division file no. **ENFR150873**

**PATRICIA EMMERT**  
Civil Penalty Waiver Appeal

Location: 39221 303rd Avenue SE, Enumclaw

Appellants: Patricia and Thomas Emmert  
*represented by* **Douglas Gill**  
329 E Main Street  
Auburn, WA 98092  
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King County: Department of Local Services, Permitting Division  
*represented by* **David Bond**  
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation: Deny appeal  
Department's Final Recommendation: Deny appeal  
Examiner's Decision: Deny appeal as to violation (1); partially reduce penalty as to violation (2)

EXAMINER PROCEEDINGS:

Hearing Opened: January 10, 2019  
Hearing Closed: January 10, 2019

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. The Department of Local Services, Permitting Division (Department) issued a notice and order (Order) finding two violations on Patricia and Thomas Emmert's property and requiring them to apply for permits. The Emmerts did not appeal that Order, nor did they follow its compliance requirements. The Department then issued penalties. The Emmerts (Appellants) did challenge those penalties, essentially asserting that the Order was incorrect at the time it was issued. This backdoor attack on the Order is beyond the scope of the issues the law allows in a penalty appeal. Looking at the issues we can weigh in on, we have no basis for reducing the penalty on violation (1), but we do have a basis for reducing the penalty on violation (2).

### Background

2. In 2014, Appellants obtained a permit for constructing a garage and for adding impervious surface. Appellants later added a carport without a permit. Ex. 10. They began the already-built-construction (ABC) permit process for the carport. They attended a Department meeting in 2016. They felt the permit fees were too high, and believed they should not have to apply for a building permit. After this ABC meeting, they added, by their estimate, approximately 1,600 to 1,700 ft.<sup>2</sup> of new impervious surface as part of a driveway project.
3. On January 26, 2018, the Department issued the Order, finding violations for (1) construction of an accessory structure, and (2) grading and/or creation of over 2,000 ft.<sup>2</sup> of new impervious surface, both without the required permits. Ex. 5 at 001. As to construction, the Order provided two options for coming into compliance—applying either for a building permit or for a demolition permit. As to grading, Appellants could either address this as part of their building permit application or via a separate application. Ex. 5 at 001-002.
4. As to the consequences of noncompliance, the Order explained that the penalties were (for violation 1) \$50 per day for the first 30 days, then \$100 per day thereafter, and (for violation 2) \$65 per day for the first 30 days, and then \$130 per day for each day thereafter. Ex. 5 at 002. Under the **APPEAL** section heading, the Order concluded with:

Any person named in the Notice and Order or having any record or equitable title in the property against which the Notice and Order is recorded may appeal the order to the Hearing Examiner of King County.

A statement of appeal must be received in writing by [the Department] within twenty-four (24) days **by February 19, 2018** of the date of issuance of the Notice and Order. A statement of appeal form is included in this packet. You are not required to use the enclosed closed form. ... FAILURE TO FILE A TIMELY STATEMENT OF APPEAL WITHIN THE DEADLINE SET FORTH ABOVE RENDERS THE NOTICE AND ORDER A FINAL DETERMINATION THAT THE CONDITIONS DESCRIBED IN THE NOTICE AND ORDER EXISTED AND CONSTITUTED A CIVIL CODE VIOLATION, AND THAT THE NAMED PARTY IS LIABLE AS PERSON RESPONSIBLE FOR CODE COMPLIANCE.

Ex. 5 at 003.

5. Appellants did not appeal. According to Appellants, a week after the appeal deadline Ms. Emmert called the Department contact and left a message. She stated that he returned her initial message, but then not her reply message. Ex. 4 at 001.
6. In June 2018, the Department issued \$10,350 in penalties. In July, Appellants filed a waiver request, which the Department denied in September. In October, Appellants challenged the penalties. As to violation (1), they explained that they had gone to the ABC meeting, but because of the fees involved with legalizing the structure, they had not taken any further compliance steps. They requested that violation (1) be reversed, because the carport was a temporary structure that could be taken out in a day and because they intend to remove it once they sell the property. As to violation (2), they believed this “completely bogus,” because the earlier permit had been signed off, and the gravel they added (post-permit) was only a 30 x 40 swath (and thus under the 2000 ft.<sup>2</sup> permit trigger). Ex. 3.<sup>1</sup>
7. We went to hearing last week. As to the issues for hearing, 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.

### Analysis

8. The thrust of Appellants’ challenge is that the Order was wrong, and that as of the time of its January 2018 issuance there was no violation and they were in compliance. Those arguments would have been available had they timely appealed the Order. However, those arguments are beyond the scope of today’s appeal. When a person fails to timely appeal a decision like the Order, “the decision of the department or division becomes final and unreviewable.” KCC 20.22.080.H. That is in keeping with the general

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<sup>1</sup> It is not clear how to square the 1,200 ft.<sup>2</sup> Ms. Emmert wrote about with the 1600–1700 ft.<sup>2</sup> Mr. Emmert testified to. It is also not clear whether these estimates include the impervious surface represented by the carport itself. These questions are not necessary to resolve with specificity, because by February 20, 2018, Appellants having added over 2000 ft.<sup>2</sup> of impervious surface without the required permits was established fact.

proposition that a department order is final and conclusive unless set aside on appeal. *Chunyk & Conley/Quad-C v. Bray*, 156 Wn. App. 246, 252, 232 P.3d 564 (2010).

9. The code mandates that 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. As we explained in our notice of hearing here, “the two violations, and the need to permit/remove the structure and to permit the grading, are established facts for purposes of our penalty appeal hearing.” We recognize how frustrating this is for Appellants to accept, but it is the law.
10. As to violation (1), Appellants argue that because they *could* (and intend to eventually) easily take down the carport, it does not require a permit. That would not have been a winning argument, even if Appellants had timely raised it in an appeal of that Order. The dividing line on whether a structure is “permanent” enough to require a permit depends on the duration it stands, not on what could happen in the future.<sup>2</sup> Yet had Appellants timely appealed the Order, we at least could have provided clarity and a new date for removal or permit application, potentially avoiding penalties. That did not happen.
11. In our November 2018 notice of hearing, we attempted to provide some clarity, explaining the legal bar against belatedly challenging the existence of the violations listed in the January 2018 Order. We quoted the above-discussed legal standard for penalty appeals, and closed by writing:

while the “assessed after achieving compliance” is limited to compliance steps an appellant took prior to the date [the Department] issued the penalty invoice, we have consistently interpreted “excessive under the circumstances” to incorporate compliance steps taken up to the date of hearing.

Yet the building was still not removed (or a permit applied for) by the time of last week’s hearing. We have no basis to reduce the \$4,500 penalty for violation (1).

12. We look at violation (2) differently. As of the time the window for appealing the Order closed in February 2018, the finding that Appellants had created 2,000 ft.<sup>2</sup> or more of new impervious surface without the required grading permit became final and unchallengeable. However, in their penalty hearing materials, the Department estimated that Appellants added 5,463 ft.<sup>2</sup>, post-2014 permit. Appellants demonstrated at hearing that this estimate of unpermitted impervious surface overstates things. Appellants’ 2014 permit approval covered a portion of the area the Department now asserts is new impervious surface. Thus, some of the 5,463 ft.<sup>2</sup> was actually *permitted* impervious surface. *Compare* Ex. 9 *with* Ex. 11 at 003.
13. While an appellant may not challenge findings or requirements that it could have challenged during the appeal period for a notice and order, KCC 23.32.120.A, the Order

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<sup>2</sup> KCC 21.06.1345, .1347 (use established after 60 days); International Building Code (IBC) at §§ 108, 3103 (maximum duration of temporary structure is 180 days); KCC 16.02.110 (adopting the IBC).

only established that Appellants created over the permit-requiring threshold of 2,000 ft.<sup>2</sup> of new impervious surface without the required grading permit. Ex. 5 at 001. The 5,463 ft.<sup>2</sup> was a *new* estimate the Department offered post-Order, and thus is fair game. We are not barred from considering Appellants’ evidence and argument on the limited question of *how much* over 2,000 ft.<sup>2</sup> of impervious service was added post-2014 permit. That the violation was likely not as extensive as the Department today asserts gives us something to hang our hat on for finding that the penalties for violation (2) are “excessive under the circumstances.” KCC 23.32.110. We shave off \$3,000 from the \$5,850 for violation (2).

DECISION:

1. Appellants’ appeal of the \$4,500 penalty for violation (1) is DENIED.
2. Appellants’ appeal of the \$5,850 penalty for violation (2) is PARTIALLY GRANTED; the remaining penalty for violation (2) is \$2,850.

ORDERED January 15, 2019.




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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 appealed to superior court by *February 14, 2019*. Either party may appeal this decision by applying for a writ of review in superior court in accordance with chapter 7.16 RCW.

**MINUTES OF THE JANUARY 10, 2019, HEARING IN THE APPEAL OF  
PATRICIA EMMERT, DEPARTMENT OF LOCAL SERVICES, PERMITTING  
DIVISION FILE NO. ENFR150873**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Douglas Jr. Gill, Patricia Emmert, Thomas Emmert, and Jeri Breazeal.

The following exhibits were offered and entered into the record:

- |               |   |
|---------------|---|
| Exhibit no. 1 | Department of Local Services, Permitting Division staff report to the Hearing Examiner                            |
| Exhibit no. 2 | Letter from Department of Permitting and Environmental Review to Patricia Emmert with civil penalty waiver denial |
| Exhibit no. 3 | Appeal, received October 11, 2018   |
| Exhibit no. 4 | Civil penalty waiver request, dated July 4, 2018  |

Exhibit no. 5	Notice and order, issued September 25, 2018
Exhibit no. 6	Approved 2014 site plan
Exhibit no. 7	Pre-application no. PREAP0126 site plan
Exhibit no. 8	Aerial photograph of subject property, dated 2017
Exhibit no. 9	Aerial photograph of subject property
Exhibit no. 10	Photograph of subject property
Exhibit no. 11	Construction permit no. ADDC140078, issued May 30, 2014
Exhibit no. 12	Photograph of property
Exhibit no. 13	Photograph of property
Exhibit no. 14	Photograph of property
Exhibit no. 15	Photograph of property
Exhibit no. 16	Photograph of property
Exhibit no. 17	Photograph of property
Exhibit no. 18	Photograph of property
Exhibit no. 19	Photograph of property
Exhibit no. 20	Photograph of property
Exhibit no. 21	Photograph of property
Exhibit no. 22	Photograph of property
Exhibit no. 23	Photograph of property
Exhibit no. 24	Photograph of property

DS/ld

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**CERTIFICATE OF SERVICE**

SUBJECT: Department of Local Services, Permitting Division file no. **ENFR150873**

**PATRICIA EMMERT**  
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 January 15, 2019.



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Liz Dop  
Legislative Secretary

**Bond, David**

Department of Local Services, Permitting Division

**Breazeal, Jeri**

Department of Local Services, Permitting Division

**Deraitus, Elizabeth**

Department of Local Services, Permitting Division

**Emmert, Patricia/Thomas**

Hardcopy

**Gill, Douglas Jr.**

Swigart & Gill Law Offices PS

Hardcopy

**Lux, Sheryl**

Department of Local Services, Permitting Division

**Williams, Toya**

Department of Local Services, Permitting Division