September 9, 2019

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

King County Courthouse
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REPORT AND DECISION

SUBJECT: Department of Local Services file no. **ENFR180522**

QUANG TRAN
Code Enforcement Appeal

Location: [redacted] Seattle

Appellant: **Quang Tran**
[redacted]
Renton, WA 98057
Telephone: [redacted]
Email: [redacted]

King County: Department of Local Services
represented by **David Bond**
Department of Local Services
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FINDINGS AND CONCLUSIONS:

1. Quang Tran (Appellant) challenges the $9,800 penalty the Department of Local Services (Department) issued him. After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, we partially grant the appeal, reducing his penalty to $5,300.

2. Appellant's property was subject to at least four and perhaps up to nine code enforcement complaints in an approximately 30-month period.[1] In the case that brings us here today, on September 7, 2018, the Department served a notice and order (Order), finding violations for: (1) accumulation of inoperable vehicles/vehicle parts, and parking/storing vehicles on non-impervious surfaces; (2) accumulation of assorted rubbish, salvage, and debris, and (3) operation of an auto repair business. Ex. 7 at 001. Appellant did not appeal.

3. On December 24, 2018, the Department issued $29,400 in penalties. Ex. 6 at 001. Appellant went through the Department's penalty waiver process. KCC 23.32.050. This resulted in the Department reducing the penalty to $9,800 on June 24, 2019. Ex. 3. The following day Appellant appealed the $9,800 amount to us. Ex. 2.

4. We went to hearing on August 15, and closed the record at the hearing's conclusion. We paused deliberation a few days later, after Appellant advised us that he was trying to reach a resolution with the Department. When the parties were unable to settle the matter, we went back on the decision clock. We did not reopen the record to accept the new evidence and argument Appellant tried to submit post-hearing. HEx. R. XIII.E. Instead, we analyze the appeal on the record as it closed August 15.

5. In a penalty appeal, the "the burden is on the appellant to demonstrate by a preponderance of the evidence that civil penalties were assessed after achieving compliance or that the penalties are otherwise erroneous or excessive under the circumstances." KCC 23.32.110. An "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. One thrust of Appellant's appeal and continuing arguments are that there never was an auto repair business on his property—i.e., that the Department got it wrong in its Order. Ex. 2 at 002; Ex. 11 at 013. That would have been fair game if Appellant had filed an appeal by the **October 1, 2018**, appeal deadline the September 7 Order provided (bold in original). Ex. 7 at 003. As the Order then stated,

> FAILURE TO FILE A TIMELY APPEAL STATEMENT FOR APPEAL WITHIN THE DEADLINES SET FORTH RENDERS THE NOTICE AND ORDER A FINAL DETERMINATION THAT THE CONDITIONS DESCRIBED IN THE NOTICE AND ORDER EXISTED AND CONSTITUTED A CIVIL VIOLATION, AND THAT THE NAMED PARTY IS LIABLE AS A PERSON RESPONSIBLE FOR CODE COMPLIANCE.

Ex. 7 at 003. *Accord* KCC 23.24.020.D. Thus it is a fixed legal fact that, at least as of September 7, the property definitively had an (3) auto repair business, along with (1)

[1] The Department noted that there have been multiple enforcement cases on Appellant's property, including the four discussed in exhibit 3 at 001. Appellant submitted a copy of a printout that is difficult to read but appears to show nine different enforcement actions, although the copy is so dark that we cannot know if some of those are the same complaint. Ex. 11 at 030.

inoperable vehicles/parts and parking on non-impervious surfaces and (2) rubbish, salvage, and debris. Ex. 7 at 001. An appellant explicitly may not—during a penalty appeal—belatedly challenge these or other items. KCC 23.32.120.A. We now turn to the three potential grounds for overturning some or all of the penalties, namely that the penalties: were assessed after achieving compliance, are excessive under the circumstances, or are otherwise erroneous.

7. As to whether the Appellant has shown that the civil penalties were assessed after achieving compliance, the Department based its December penalties on its November 20, 2018, site visit. Ex. 8. Those photos show the property nowhere near compliance. Ex. 8. Later photos show the property still not in compliance on January 8, 2019. Ex. 9.

8. Appellant asserts that we should look not at November 20, but instead at September 21 (the date Appellant asserts he brought the property into compliance) or at October 2 (the date of a Department drive-by). We reject Appellant's theory that if the violations were corrected for some period prior to the Department issuing penalties, then the property was in "compliance"—even if the violation had resumed prior to the Department issuing penalties and the Department eventually recording a certificate of compliance.

9. A notice and order is a violation not just against a person, but one recorded against the property itself, in the official county property records. KCC 23.24.040.A. A notice and order must include a statement advising the responsible person that it is that person's duty to notify the Department of any actions taken to achieve compliance with the notice and order. KCC 23.24.030.N. Assuming the notice and order is not successfully appealed, it ceases to be effective when all the violations specified in the notice and order are corrected and the Department records a compliance certificate. KCC 23.24.040.B.

10. If a responsible party contacts the Department when she believes compliance has been achieved, the Department eventually comes out to re-inspect; re-inspection is not instantaneous and there is always some lag time. And then, if the Department agrees on that visit that the property is in compliance, it takes some time for the Department to issue a compliance certificate closing out an enforcement case.

11. If the property falls out of compliance *after* a compliance certificate is recorded (thus closing out the initially-recorded notice and order), that is properly deemed a new violation, requiring new enforcement. This happened on the subject property in ENFR170865, after the Department issued an April 2018 compliance certificate. When the complaint in today's case came in less than two months later, in June 2018, the Department properly opened a new enforcement file—today's case (ENFR180522). Ex. 3 at 001.

12. However, it would be absurd if merely showing compliance on a given day legally amounts to final satisfaction of a notice and order. One could, for example, simply stop working on cars, move them (and any junk) off for a day, claim, "See, I'm in compliance today," move them back on, and avoid any real compliance. If something other than recording a compliance certificate ended an enforcement case, neighbors and the Department would be left chasing their tails with no real way to stop nuisances from

working their detrimental effect on a neighborhood's public health, safety and environment.[2] It would be, to borrow an analogy, "capable of repetition, yet evading review." *Cf. In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004). We presume the Council did not intend an absurd result, and we interpret the code to avoid absurdity. *State v. Sandoval*, 8 Wn. App. 2d 267, 273 n.8, 438 P.3d 165 (2019). We do not adopt Appellant's theory. Compliance means compliance up until a certificate is recorded, closing out that notice and order.

13. Even if we accepted Appellant's theory that temporary compliance, prior to a certificate being recorded, could be sufficient, that is not what our facts show here. The September 7 Order closed with a directive that Appellant had a:

> **DUTY TO NOTIFY (KCC Section 23.24.030N)**
>
> The person(s) responsible for code compliance has the DUTY TO NOTIFY the Department of Permitting and Environmental Review—Code Enforcement of ANY ACTION TAKEN TO ACHIEVE COMPLIANCE WITH THE NOTICE AND ORDER.

Ex. 7 at 003. Appellant did not contact the Department until *after* he received the December penalties.

14. If Appellant believed that he had sufficiently taken care of things on September 21, he could have followed the Order's directive and notified the Department of the steps he had taken that he believed had brought the property into compliance. Ex. 7 at 003; KCC 23.24.030.N. He did not do so on September 21, nor at any time before he received the December penalties.

15. There is a good reason the code requires—and the Order advised Appellant—that the responsible party (typically the owner) contact the Department after compliance has been achieved. The Department can then schedule a formal walk-through. If the officer believes those efforts are incomplete, the parties can talk those through. The owner will know what remains to be fixed, and the situation can be resolved *before* the Department issues penalties.

16. In the worst case scenario—if the Department and owner find themselves at an impasse after such a visit, with the Department adamant that the property has not yet been brought into compliance and the owner adamant that it has—both the Department and the owner will understand the need to thoroughly photo-document their respective positions. If such a dispute later went to penalties and to a penalty appeal, an appellant would have more than just the paltry few photographs here that Appellant and the Department took on September 21 and October 2 to prove the point.

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[2] "All civil code violations are hereby determined to be detrimental to the public health, safety and environment and are hereby declared public nuisances." KCC 23.02.030.A. The letter Appellant submitted from a neighbor described the situation as a "nightmare." Ex. 10 at 004.

17. Even if we adopted Appellant's theory that as long as there was compliance on one day, this is all the compliance the responsible party has to achieve, we would still deny the challenge. After hearing all the testimony and looking at the few photos available for September 21 and October 2, we do not find the auto repair business had ceased nor that the other vehicle and rubbish violations has been brought into compliance on September 21 or October 2 or at any other point until well *after* the Department issued penalties.

18. As to whether the penalties were excessive under the circumstances, Appellant describes factors that hindered him achieving compliance. To be sure, some of these were of his own making. For example, despite being a real estate agent, exhibit 10 at 001, he allowed tenants to rent his property without a written lease agreement. That left him with less leverage to hold the tenants to some standard of care or obligation. And of course, ENFR180522 was somewhere between the fourth and ninth code complaint the Department had to open on his property in less than 30 months. Ex. 3 at 001. A neighbor described living next door as a "nightmare." Ex. 10 at 004. One of the previous enforcement cases, ENFR170865, had gone through the notice and order process and even to penalty, before the Department waived Appellant's penalty.

19. Still, Appellant offers solid reasons why circumstances here warrant a reduction to the otherwise-applicable penalty, including: his wife's stroke (which increased his responsibilities), sleep deprivation that made him less effective, the tenant's medical condition, neighborhood violence, his fear of the tenant's extended family, his efforts to get eviction going, his efforts to remove the cars, the tenants not timely vacating the property, and him eventually bringing the property into compliance.

20. We would have found that a substantial reduction from the initial code enforcement bill was appropriate here. In the past, we have often reduced a penalty when the Department's waiver process results in no adjustment. However, here the waiver process ended with the Department reducing the bill by two-thirds. We think the Department got that right. Even if the Department had the burden (which it does not) to show that the penalty was *not* excessive under the circumstances, we would have upheld its determination that a two-thirds reduction was sufficient here.

21. However, we find a portion of the penalties erroneous because the Department calculated the two-thirds reduction from the wrong starting point. The Department assessed fines as if today's case was the fourth violation. Ex. 1 at 001; KCC 23.32.010.b. As discussed above, the Department had to open multiple enforcement cases on Appellant's property. Ex. 3 at 001; Ex 11 at 030. For at least four of these, the Department apparently determined that there was a violation. However, only in ENFR170865 and in today's ENFR180522 did the Department issue a notice and order, which Appellant did not appeal.

22. That the Department may have informally determined that there were violations in two additional cases does not make them so. The code clarifies that:

> E. "Found in violation" means that:

1. A citation, notice and order or stop work order has been issued and not timely appealed;

2. A voluntary compliance agreement has been entered into; or

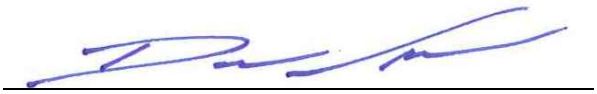
3. The hearing examiner has determined that the violation has occurred and the hearing examiner's determination has not been stayed or reversed on appeal.

KCC.23.020.010. Only ENFR170865 meets the above definition. Therefore, the penalty the Department should have issued in December was not $29,400, but $15,900.[3] Applying a two-thirds reduction to the correct starting point results in a revised penalty of $5,300.

DECISION:

We partially grant Appellant's challenge, in that the Department erroneously calculated the initial penalty amount. Applying the Department's two-thirds reduction to the correct starting point results in a $5,300 penalty.

ORDERED September 9, 2019.



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 AUGUST 15, 2019, HEARING IN THE APPEAL OF QUANG TRAN, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR180522

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Quang Tran, Jeri Breazeal, and David Bond. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

The following exhibits were offered and entered into the record on August 15:

[3] Incorrectly adding $50/day for each of the three violations for the first 30 days, plus $100/day for days 31-50, adds up to $13,500 in erroneous penalties.

Exhibit no. 1	Department of Local Services staff report to the Hearing Examiner
Exhibit no. 2	Appeal, received June 25, 2019
Exhibit no. 3	Letter, waiver denial, dated June 24, 2019
Exhibit no. 4	E-mail, Settlement agreement offer, from Elizabeth Deraitus, dated April 11, 2019
Exhibit no. 5	E-mail, Waiver request, dated January 3, 2019
Exhibit no. 6	Invoice, dated December 24, 2018
Exhibit no. 7	Notice and order, issued 7657000110, issued on September 7, 2018
Exhibit no. 8	Photographs of subject property, dated November 20, 2018
Exhibit no. 9	Photographs of subject property, dated January 8, 2019
Exhibit no. 10	E-mail, from Quang Tran, dated July 25, 2019
Exhibit no. 11	Exhibit explanations (50 pages), from Quang Tran, sent August 9, 2019

DS/jo

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR180522**

QUANG TRAN
Code Enforcement Appeal

I, Jessica Oscoy, 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 September 9, 2019.

Jessica Oscoy
Legislative Secretary

Bond, David
Department of Local Services

Breazeal, Jeri
Department of Local Services

Deraitus, Elizabeth
Department of Local Services

Lux, Sheryl
Department of Local Services

Tran, Quang
Hardcopy

Williams, Toya
Department of Local Services