

November 4, 2022

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

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REPORT AND DECISION

SUBJECT: Department of Local Services file no. **ENFR190492 Waiver**

PATRICK AND JUSTIN MILLER
Code Enforcement Appeal

Location: [REDACTED] Maple Valley

Appellants: **Justin and Pat Miller**

[REDACTED]
Maple Valley, WA 98038

Telephone: [REDACTED]

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King County: Department of Local Services
represented by **Holly Sawin**
Department of Local Services
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Renton, WA 98057
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FINDINGS AND CONCLUSIONS:

Overview

1. In October 2021, we issued a ruling upholding certain violations and pegging compliance deadlines to set times after King County reached Phase 4 of Covid recovery. The Department of Local Services (Local Services) concluded that we reached Phase 4 in June 2021, and subsequently issued penalties. The Millers appealed; they argue that we reached Phase 4 only earlier this week, and thus that any penalties are premature. Finding the Millers' argument slightly more persuasive, we grant their appeal.

Background

2. After receiving and investigating a code enforcement complaint in 2019, Local Services served a notice on Pat Miller, asserting violations for (1) occupancy of a substandard dwelling (an RV), (2) storage of vehicles, structures, and debris on a vacant site, and (3) clearing, all without the necessary permits. Pat Miller and his son, Justin Miller, timely appealed. Local Services subsequently dropped the (3) clearing allegation.
3. We held a hearing in early August 2019. Later that month we issued a decision finding that: the RV (or any RV) is a vehicle, not a permanent, legal, dwelling unit; that no (legal) residence had ever been established on the property; and there was no established primary use of the property for the cargo containers, other structures, and vehicle storage to be legally accessory to. We concluded that Pat Miller would need to clear everything (other than logs) off the property and find different lodging. Ex. A6.
4. Agreeing with Justin Miller’s explanation that, especially given his father’s higher risk factors, getting him moved into alternative lodgings during Covid was extremely problematic, we pegged the deadline for clearing off the remaining vehicles, RVs, structures and materials (other than logs) to after the Governor declared that King County had reached Stage 4. Ex. D 3 at 010.
5. After the Millers filed a timely motion for reconsideration, we amended the compliance timing to:
 - A. October 24, 2020, to remove the inoperable vehicles, and for [the Millers] to arrange for a site visit with Ms. Sawin for on or before October 24 [2020],
 - B. Sixty days after the Governor declares that King County has reached Stage 4 in Covid recovery to remove the operable vehicles [Pat Miller] is not regularly being driven or needing to use to haul stuff off the property, and
 - C. Nine months after the Governor declares that King County has reached Stage 4 in Covid recovery to remove the remaining items (other than logs) and cease occupancy.
6. Believing that the Governor had moved King County to Phase 4 on June 30, 2021, Local Services calculated that the operable vehicles not regularly driven or needed to haul stuff off the property had to be removed by August 29, 2021, with the remaining items (other than logs) needing to be removed, and occupancy ceased, by March 30, 2022.
7. After Pat Miller failed to meet those dates, Local Services issued him \$7350 in penalties. The Millers followed the procedure for requesting a waiver of these penalties. After Local Services denied the request, the Millers timely appealed to us. Ex. D3. We held a hearing on October 27, 2022.

Legal Standards

8. 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.
9. For most code enforcement matters, Local Services bears the burden of proof. Exam. R. XV.E.2. However, 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.

Analysis

Issue-Framing

10. There is no material factual dispute related to the Miller property. The inoperable vehicles were timely removed in October 2020, satisfying the first compliance deadline. While Justin Miller described their continuing efforts to clean up the property and find alternative lodgings for his father, Pat Miller has not ceased occupancy nor removed all the remaining items (other than logs) off the property.¹ Thus, the Millers cannot demonstrate that penalties were assessed after [a] they achieved compliance.
11. Instead, the threshold question of whether the penalties were [b] otherwise erroneous is a mixed question of fact and law turning on when “the Governor declare[d] that King County ha[d] reached Stage 4 in Covid recovery,” as we framed the starting point for getting everything else off the property. We would only tackle whether the amount of the penalties was [c] excessive under the circumstances, if we find that *a* penalty was properly issued.
12. Local Services points to the Governor’s May 13, 2021, announcement moving the state to Phase 3 from May 18 to June 30, and moving towards a statewide, June 30 reopening date as the pertinent Governor declaration. Ex. D5 at 001. Local Services also submitted a Seattle Times article from June 30 proclaiming that “Washington has officially reopened.” Ex. D5 at 002. Following that logic, operable vehicles not regularly being driven or needed to haul stuff off the property had to be removed by August 29, 2021 (sixty days post-June 30, 2021) and the remaining items (other than logs) needed to be removed and occupancy ceased by March 30, 2022 (nine months post-June 30, 2021). As compliance was not achieved by those deadlines, the penalties were appropriate.

¹ As to the second compliance requirement—operable vehicles not being regularly-driven or needed for hauling—Justin Miller stated that they had removed all such vehicles. It is not clear exactly when this occurred, but the April 2022 photo shows a second RV, which also qualifies a vehicle. Ex. D4 at 002. That may have already been removed, but if not, the second RV (meaning the one Pat Miller is *not* living in) will need to be off by December 30, 2022, as explained in paragraph 16.

13. Justin Miller counters that:

- Phase 4 was, at the point when we issued our October 2020 order, defined to include the resumption of large sporting events, yet the Governor’s May 2021 announcement stated that restrictions on large indoor events would *not* lift at the end of June.
- Nowhere in that Governor announcement, or any other Governor announcement, did the Governor state we were at “Phase 4” or announce a future date where we would be at “Phase 4.”
- Snohomish County’s website still showed, as of last week’s hearing, that Phase 4 had not been reached.
- One criteria for larger counties to reach Stage 4 was needing to get under certain thresholds for new Covid cases per two-week period and new Covid hospitalizations per week, and yet January 2022 saw a dramatic spike in new Covid cases and a rise in Covid-related hospitalizations.
- In September 2022, the Governor announced that the state of emergency would end October 31, 2022; Justin Miller argues that is the closest available approximation to “the Governor declar[ing] that King County has reached Stage 4 in Covid recovery.” Thus, the sixty day- and nine month-deadlines have only just now started to run.

Exs. A1-A4.

Assessment

14. This is a tricky question, because the Governor has never actually declared that we were at “Phase 4”—nor will he ever. The Healthy Washington – Roadmap was the document that explained Washington’s phased approach and what each phase signified. Ex. A1 at 002. Yet in May 2021, the Governor announced that “When Washington fully reopens economy, the state will *move beyond* the Healthy Washington – Roadmap to recovery,” the Roadmap being the document that set phases one through four. Ex. A2 at 001 (*italics added*). In a sense, the Governor changed the goalposts. King County, nor any other county, will ever reach “Phase 4” because the phase system *ceased* to exist in June 2021. So, our task is to determine what Governor announcement *most closely equates* to “the Governor declar[ing] that King County has reached Stage 4 in Covid recovery.”
15. Local Services makes a strong case for the Governor’s May 2021 announcement about a June 2021 reopening being that declaration. Justin Miller’s counter about the January 2022 spike in new Covid cases and hospitalization has some appeal in retroactively showing that June 2021 should not be treated as the equivalent of reaching Phase 4. However, we did not write our second or third deadlines in terms of sixty days and nine months “after King County reaches the benchmarks for Stage 4 of Covid recovery.” Instead, we wrote it in terms of a *Governor* declaration. So, as between Local Services’ assertion of June 2021 and the Millers’ initial assertion of March 2022, Local Services has the significantly better argument.

16. However, in their pre-hearing exhibits and then at hearing, Justin Miller pointed to the Governor’s September 2022 announcement of an October 31, 2022, end to the remaining Covid 19 emergency orders and the state of emergency as the trigger. The announcement included:

Nearly three-quarters of the governor’s 85 Covid 19 emergency orders have already been lifted, and an additional 13 healthcare-related orders will end Oct. 27. The remaining 10 orders [will] be lifted on Oct. 31 [2022] including the underlying state of emergency.

The statewide Face Covering Order issued by the state Department of Health will remain in place for health care and long-term s[e]ttings, as well as correctional facilities under certain circumstances after the state of emergency ends [i.e., after October 31, 2022]. The governor is also looking at options to ensure there are protections for workers who choose to wear a mask in their workplace.

Vaccination requirements for healthcare and education workers will end, but employers will continue to be able to require them if they choose. Inslee has already announced that Covid 19 vaccination will remain a condition of employment for most Washington state agencies.

17. We find that this September 2022 Governor announcement of the October 31, 2022, end to remaining Covid 19 emergency orders and to the state of emergency is a slightly closer fit to him declaring “that King County has reached Stage 4 in Covid recovery” than his May 2021 announcement that by June 2021 the state would “move beyond” the phase system. So, October 31, 2022, is the correct starting date to calculate the sixty days to remove the operable vehicles Mr. Miller is not regularly driving or needing to haul stuff off the property (i.e., by December 30, 2022) and the nine months to remove the remaining items (other than logs) and cease occupancy (i.e., by July 31, 2023). Therefore, Local Services’ penalty assessment was, while understandable, erroneous; the Millers are still well within compliance deadlines we set.

DECISION:

Because Local Services’ penalty assessment was premature, we GRANT the Millers’ appeal.

ORDERED November 4, 2022.



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 OCTOBER 27, 2022, HEARING IN THE APPEAL OF PATRICK AND JUSTIN MILLER, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR190492 WAIVER

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Justin Miller, Patrick Miller, and Holly Sawin. A verbatim recording of the hearing is available in the Hearing Examiner’s Office.

The following exhibits were offered and entered into the record by the Department:

Exhibit no. D1	Department of Local Services staff report to the Hearing Examiner
Exhibit no. D2	Notice and order, issued January 1, 2020
Exhibit no. D3	Civil Penalty Waiver Denial Appeal received August 11, 2022
Exhibit no. D4	Photos taken by Officer Sawin of subject property on April 25, 2022
Exhibit no. D5	A. Governor Inslee announces Washington State open on June 30, 2021, Washington State Governor’s Office B. Seattle Times, June 30, 2021, Washington officially reopened
Exhibit no. D6	Nearmap aerial dated July 20, 2022 of subject property

The following exhibits were offered and entered into the record by the appellants:

Exhibit no. A1	Excerpts from Washington’s reopening guidelines from May 31, 2020
Exhibit no. A2	Excerpts from the announcement of ‘full reopening’ on June 30, 2021
Exhibit no. A3	Excerpts from the WA Department of Health Covid Data Dashboard
Exhibit no. A4	Excerpts from the announcement that the state of emergency in Washington will end on October 31, 2022
Exhibit no. A5	Screenshot from Snohomish County’s Covid Response webpage
Exhibit no. A6	Examiner's decision dated August 25, 2020

DS/lo

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR190492 Waiver**

PATRICK AND JUSTIN MILLER
Code Enforcement Appeal

I, Lauren Olson, 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 4, 2022.



Lauren Olson
Legislative Secretary

Breazeal, Jeri

Department of Local Services

Lux, Sheryl

Department of Local Services

Miller, Justin and Pat

Hardcopy

Sawin, Holly

Department of Local Services

Whalen, LaDonna

Department of Local Services