February 3, 2023

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 Local Services file no. **ENFR210205 (Waiver)**

RACHNA AND STEPHAN GRUNKEMEIER
Code Enforcement Appeal

Location: [redacted] Woodinville

Appellants: **Rachna and Stephan Grunkemeier**
[redacted]
Lehi, UT 84043
Telephone: [redacted]
Email: [redacted]

King County: Department of Local Services
represented by **LaDonna Whalen**
Department of Local Services
919 SW Grady Way Suite 300
Renton, WA 98057
Telephone: (206) 477-5567
Email: ladonna.whalen@kingcounty.gov

FINDINGS AND CONCLUSIONS:

Overview

1. Rachna and Stephan Grunkemeier (Appellants) challenge a denial of a penalty fee waiver. After hearing witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, we find that Appellants have not shown that the penalties were erroneously assessed but have shown that they are excessive under the circumstances. We halve the penalties.

Background

2. In March 2021, Local Services issued a stop work order for Appellants placing or constructing a structure, along with clearing and grading, all without permits. In April 2021, Local Services followed up with a notice and order asserting violations related to structure construction, clearing and grading, and occupancy of an RV. Appellants timely appealed both of those Ex. D7 at 002.

3. In July 2021, we held a consolidated hearing. In August 2021, we issued a decision overturning the RV violation in full, overturning in part the grading violation, upholding in part the clearing violation, and upholding in full the construction violation. We set deadlines, required Appellants to diligently follow through the permit process until completed, and allowed for reasonable deadline extensions. Ex. D7 at 008.

4. In June 2022, Local Services issued penalties. Ex. D2. Local Services eventually denied Appellants' waiver request in September. Ex. D2 at 002. Appellants timely appealed in October. Ex. D3. We held a prehearing conference in November. The parties attempted to settle the matter short of a hearing, but were unsuccessful. We went to hearing on January 20, 2023.

Legal Standards

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. In analyzing that, we apply a preponderance-of-the-evidence standard. HER XV.F.1 And we do not grant substantial weight or otherwise accord deference to agency determinations. HER XV.F.3.

Preliminary Matters

7. Appellants objected that Local Services submitted its staff report and attachments at 4:58 PM on the due date. Per our rules, documents received after 4 PM are deemed received the next business day. HER IV.A. Appellants asked for unspecified sanctions. Per our rules, failure to timely submit a staff report may be grounds for a continuance, if the movant can demonstrate that the failure resulted in prejudice that could not otherwise be mitigated. HER VI.B. Here we addressed that by allowing Appellants an extra day (essentially an additional 23 hours from their receipt of the staff report) to submit their rebuttal exhibits. Appellants did not assert any prejudice.

8. Local Services objected to five audio recordings Appellants submitted of their conversations with Local Services staff. While one of them is an excerpt from a recorded Examiner conference—which is by definition an on-the-record event, with Zoom announcing at the beginning that the meeting is being recorded—several of them appear to have been recorded without the Local Service staffer's knowledge or consent. State law makes it unlawful to record a private communication without first obtaining the consent of all the participants in the communication. RCW 9.73.030. Although defining what qualifies as a "private" communication is an involved process,[1] recording without asking permission or at the very least giving notice is troubling. Appellants will want to check with their attorney before they record anything else, given the potential criminal law implications.

9. One of the recording exhibits is troubling in a different way. On it, the Local Services staffer asks Appellants questions about how they are using and planning to use the structure Appellants are trying to permit as an accessory living quarter, including who was staying there for how long. He even explicitly explains *why* he is asking those questions—"temporary use by guests of the occupant" does not disqualify a building from treatment as an accessory living quarter, while longer habitation would. *See* KCC 21A.06.010. Those are exactly the type of questions an official should be asking in trying to help shepherd a permit through the process. Yet Appellants labeled that exhibit "[employee name] invades privacy."

10. That seems ironic if, as it appears, Appellants did not obtain his consent before recording the conversation (and Appellants did not claim they obtained *anyone*'s consent for *any* of the conversations they recorded, nor that they even notified anyone they were recording) and thus it was they who were doing the privacy invasion. It also played into a paranoia Appellants exhibited hearing that Local Services was out to trap them or set snares or purposefully knock them off their path for compliance. None of that helped their credibility.

11. Although RCW 9.73.050 makes evidence obtained in violation of RCW 9.73.030 inadmissible in a tribunal, we are not entirely sure if there was a violation. Nor is it important to the case because the only portion of any of those recordings relevant to our analysis is the February 17, 2022, statement that Appellants would have 60 days to submit an update. We thus admit exhibit 7 and do not admit the other four recordings.

12. Finally, some of Appellants requested relief items—like us ordering Local Services to appoint a single contact person and to remove a certain employee from discussions—are beyond our authority here. For something like a notice and order appeal, an examiner has fairly wide-ranging discretion both backwards-looking and forward-looking. But as noted above, our authority is relatively limited in a penalty waiver appeal—were the penalties erroneously issued or, if

[1] *See, e.g.*, *State v. Townsend*, 147 Wash. 2d 666, 57 P.3d 255, 259 (2002).

not, is the amount of those penalties excessive? We thus turn to that limited analysis now.

Analysis

13. While Appellants are on their way to obtaining approvals and bringing their property into compliance and they hope to achieve compliance later this spring, it is undisputed that they were not in June when the penalties were issued (and still not today) in compliance. Thus, Appellants have not demonstrated that penalties were assessed after Appellants achieved compliance. The remaining ground for entirely overturning penalties is whether the penalties were otherwise erroneously issued. And if not, we can reduce the penalties if we find the amount excessive under the circumstances. We address those in turn.

14. There are three time periods the parties discussed. The first involves Appellants efforts to start the permit process and the back-and-forth in getting extensions on submitting materials and other interactions leading up to a February 17, 2022, prescreening meeting; Local Service did not assess any penalties for events or allegedly missed deadlines during that period. The third involves events *after* Local Services announced on June 10, 2022, that it was assessing penalties; Local Service did not assess any penalties for events or allegedly missed deadlines after June 10. The first and third periods impact whether the *amount* of penalties were excessive under the circumstances—given Appellants ongoing and significant efforts to bring the property into compliance—as discussed below. But other than providing a backdrop, they are not particularly relevant to whether assessing penalties in June was itself erroneous.

15. Turning to the relevant time period, on February 17 Appellants and several Local Services staffers met for a conference. At that conference, it was agreed that Appellants would provide an "update in 60 days." Ex. A7. Local Services then followed up with a February 22 letter about required next steps. Ex. D3 at 019-20. There was a dispute about the timeframe and what (an actual application or only an update) was required. So, on March 2, Ms. Grunkemeier wrote supervisor Jim Chan asking whether he could:

> confirm that code enforcement accepts May 1 as a reasonable date by which [Appellants] will offer an update on our case, and thereafter code enforcement will extend the permit submittal deadline to a reasonable date sometime in the summer.[2]

Mr. Chan responded—and this is the critical email on which this appeal turns—on March 4 that:

> We are good with the update coming by May 1 but you should be prepared with a solid time estimate for the permit submittal at that time.

[2] The full email chain for these three emails is exhibit D4 at 004.

Ms. Grunkemeier responded later that day thanking Mr. Chan and stating:

> Yes. We are moving as fast as we can however not getting any phone calls back. It's been pretty frustrating trying to get the engineers to respond in a timely manner. Everyone is behind in delaying their projects are not taking on any new projects especially if they are small projects. I will update you as soon as I know.

16. And that, unfortunately, was the last information Appellants conveyed to Local Services until after Local Services announced penalties on June 10. On June 10, Local Services wrote that:

> It is now more than 30 days past the May 1, 2022 deadline for permit submittal and we have not had an update or permit submittals. You are now in violation of the Hearing Examiner's Order and subject to civil penalties. This is also to inform you our next steps in enforcement case[] is assessing the civil penalties…

17. There are several ways that the penalties *could* have been erroneous in their entirety (and not simply excessive).

18. First, it could have been that requiring an update by May 1—eight weeks after the early March exchange—was itself an unreasonable deadline, in violation of our verbiage that Local Services provide reasonable deadline extensions. Ex. D7 at 008. But that would be an uphill battle for Appellants to make because it was Appellants themselves who asked Mr. Chan to set "May 1 as a reasonable date by which we will offer an update on our case." There was nothing unreasonable about allowing eight-plus weeks to provide an update.

19. Second, it could have been that Local Services misinterpreted what it meant to meet the deadline—and we accord Local Services no deference. If Appellants had submitted an update—any update—by May 1, the fact that they did not submit an actual application by May 1 would not have been sufficient grounds for Local Services issuing penalties. (In our most recent penalty appeal decision, we determined that Local Services had erroneously interpreted a deadline and we tossed out the whole penalty.[3]) But here Appellants did not submit an update after 8 weeks (i.e. March 4 to May 1), or even 9 weeks or 10 weeks or 11 weeks or 12 weeks or 13 weeks. It was only after Local Services announced penalties that Appellants provided any status update.

20. And third, it could have been that Appellants timely updated Local Services with all the information they could diligently gather by May 1, and Local Services

[3] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2022/2022%20Nov/ENFR190492_Waiver_Miller.ashx?la=en at ¶¶ 11-17.

unreasonably found it lacking and then issued penalties. So, suppose on May 1 Appellants had emailed something on the lines of:

> After our March 4 discussion, we contracted with a consultant who advised us on April 7 that they could not get started for 8½ weeks. [Ex. D3 at 010-11.] We have tried to get their estimate on how long it will take them to actually complete their work once they start, and the most we can glean is that _____. That is as solid a timeline as we can offer.

21. Then, if Local Services had simply shrugged that off and immediately issued penalties, those penalties would be ripe for overturning in total. But that is not what happened. Appellants did not submit *any* update by May 1 or even by the time Local Services announced penalties on June 10.

22. At hearing, Appellants tried to shift responsibility to Local Services, asserting that Local Services should have sent *them* something or reached out to them. *See also* Ex. D4 at 003. Yet that was not what in early March Appellants asked for (that Mr. Chan "confirm that code enforcement accepts May 1 as a reasonable date by which we will offer an update on our case") nor what Mr. Chan agreed to (that Local Services was "good with the update coming by May 1 but you should be prepared with a solid time estimate for the permit submittal at that time"). Ex. D4 at 004. Appellants missed the deadline, and missed it by a lot. Thinking they were not required to give an update because they did not have anything they deemed sufficiently concrete was, in hindsight, a really unfortunate decision.

23. In sum, Appellants have not demonstrated that civil penalties were erroneously assessed.

24. And that brings us to our third and final inquiry, whether Appellants can demonstrate that penalties are excessive under the circumstances.[4] And here the full panoply of events, including those in the time periods both before and Local Services issued penalties, are relevant. Appellants have worked hard to obtain the permits necessary to bring the property into compliance.

- We learned at hearing that Appellants began the approval process right after we concluded our July 2021 hearing and even *before* we issued our August 2021 decision that officially restarted their compliance clock.

- They continued making progress, submitting preapplication materials and retaining consultants.

[4] At one point Local Services listed the $65/day penalty for the first 30 days, then erred in concluding that when the per day penalty doubled, it would be $80/day. Ex. D3. While the explanation was confusing, the $5850 penalties directly follow from the code, as explained in the notice and order itself. Our analysis here probes whether that amount was, even if authorized, nonetheless excessive due to other circumstances.

- After penalties were issued, they submitted their application before the August 1 deadline Local Services set for the application itself.

- They have apparently obtained plumbing, electrical, underfloor, framing, and insulation approvals.

That is a lot of sustained effort. We find that Appellants have demonstrated that a decent penalty reduction is in order.

DECISION:

1. We DENY the appeal as to penalties being issued after compliance was achieved or being otherwise erroneous.

2. We GRANT the appeal as to penalties being excessive under the circumstances, and we halve the $5850 penalty to $2925.

ORDERED February 3, 2023.

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 JANUARY 20, 2023, HEARING IN THE APPEAL OF RACHNA AND STEPHAN GRUNKEMEIER, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR210205 (WAIVER)

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Rachna Grunkemeier, Stefan Grunkemeier, and LaDonna Whalen. 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	Copy of Waiver denial letter, dated September 19, 2022
Exhibit no. D3	Copy of Appeal, received October 4, 2022
Exhibit no. D4	Copy of Email Exchange
Exhibit no. D5	Copy of Waiver/Adjustment Form Signed July 22, 2022
Exhibit no. D6	Copy of Notice and Order, issued September 19, 2022
Exhibit no. D7	Copy of Hearing Examiner's report, date August 13, 2021

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

Exhibit no. A1	Appeal of Penalty Waiver Decision
Exhibit no. A2	Holly told to not trespass
Exhibit no. A3	Holly's silver car on our property on 3.25.21
Exhibit no. A4	Holly trespasses on property on 3.25.21. Picture taken from Holly
Exhibit no. A5	Holly locations from where pictures were taken on 3.25.21
Exhibit no. A6	Stamped plans July 27th
Exhibit no. A7	Audio File Holly 60 days
Exhibit no. A8	Permit application 7.28.22, Case #ENFR21-0205, Grunkemeier
Exhibit no. A9	ISSUED PERMIT, Case #ENFR21-0205, Grunkemeier
Exhibit no. A10	Sheryl gives estimate timeline for obtain a permit after initial submittal
Exhibit no. A11	Jim Chan states Holly does NOT need to be at the premeeting hearing
Exhibit no. A12	Jim Chan assigning Sheryl Lux on 7.9.21 instead of Holly Sawin
Exhibit no. A13	Sheryl confirms I would be working with other staff and NOT Holly
Exhibit no. A14	Request to NOT work with Holly as she has lost our trust
Exhibit no. A15	Sheryl refers us to work BACK with Holly
~~Exhibit no. A16~~	~~Audio File Matt Caskey in lieu of Holly invading our privacy~~
~~Exhibit no. A17~~	~~Audio File Holly being invasive~~
~~Exhibit no. A18~~	~~Audio File Ladonna admits incorrect numbers~~
~~Exhibit no. A19~~	~~Audio File Matt Caskey invades privacy~~
Exhibit no. A20	Rebuttal Letter

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR210205 (Waiver)**

RACHNA AND STEPHAN GRUNKEMEIER
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 February 3, 2023.

Lauren Olson

Lauren Olson
Legislative Secretary

Breazeal, Jeri
Department of Local Services

Campbell, Thomas
Department of Local Services

Grunkemeier, Rachna/Stephan
Hardcopy

Moffet, Bill
Hardcopy

Sawin, Holly
Department of Local Services

Whalen, LaDonna
Department of Local Services

Williams, Dean
Johns Monroe Mitsunaga Kolousková, PLLC
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