



King County

Transportation, Economy and Environment Committee

STAFF REPORT

Agenda Item:	9	Name:	Rick Bautista
Proposed No.:	2013-0187	Date:	April 30, 2013
Invited:			

SUBJECT

An ordinance relating to code enforcement penalties used by the Department of Permitting and Environmental Review ("DPER").

SUMMARY

Proposed Ordinance 2013-0187 would amend the Code to improve the appeal process for Code compliance penalties. These changes would codify holdings in a recent Washington court decision. They also would result in better use of County resources.

SUPPORT OF THE STRATEGIC CLIMATE ACTION PLAN

Proposed Ordinance 2013-0187 was not identified as a specific action in the Strategic Climate Action Plan ("SCAP"). It has not been analyzed in this report for compliance with SCAP since it only revises code enforcement procedures.

BACKGROUND

In his bi-annual report, dated August 31, 2012, the Hearings Examiner outlined the need for revisions related to the County's Code enforcement process. The report noted that in Post v. City of Tacoma (2009), the court struck down, as a due process violation, a code enforcement system which failed to afford citizens an opportunity to appeal certain penalties. In response to that decision, in 2011 King County amended KCC 23.32.100 through .120 to create that appeal opportunity.

In his 2012 report, the Hearings Examiner:

- noted three ways in which the 2011 revisions still failed to solve the due process issues raised in Post;
- pointed to a requirement that the appellant recount in his/her appeal the violations for which civil penalties were assessed as confusing to the appellant and of no added benefit to the appeal process; and

- described how the penalty appeals process could be better integrated with the Code's provisions regarding penalty waivers.

The report concluded that while the 2011 code revisions were a necessary and worthwhile effort to address concerns the court laid out in *Post*, experience applying the revisions in several cases has led to the conclusion that the pertinent code sections could benefit from further attention.

ANALYSIS

1. Due Process

- a. **KCC 23.32.100(B)** – Under current Code, a civil penalty invoice appeal period runs “fourteen days from the date of the invoice.” Unfortunately, invoices are not necessarily served promptly after the invoice is dated. In one case, for example, DPER mailed the invoice *after* the appeal period had ended; and when the property owner appealed, DPER moved to dismiss the owner's appeal as untimely for failing to file the appeal within 14 days of the date of the invoice.

The proposed revision would bring penalty appeals in line with other appeals under Title 23, that is, 14 days from **service**.

- b. **KCC 23.32.110** - The current Code only allows a property owner ("appellant") to only "challenge whether civil penalties were assessed for any time period after achieving compliance." The burden of proof is on the appellant to establish that penalties were charged even after compliance was achieved. The Code also requires that the Hearings Examiner to conduct a "closed record hearing," which is an undefined term.

In addition to allowing the appellant to assert, and the Hearings Examiner to decide, if the penalty was “erroneous or excessive,” the proposed modification to this section would remove the requirement that the Hearings Examiner conduct a "closed record hearing."

These changes codify the holdings in Post. As noted in that case, the court ruled that under a code compliance system where a party was not provided an appeal process to prove that his repair efforts had brought his property into compliance prior to Tacoma issuing a penalty exemplified a due process violation. The Post decision also opined that this was only a “notable illustration” of why an appeal process was required. As the court asserted there could be are other ways, beyond achieving compliance before a penalty was assessed, that a monetary penalty could be “erroneous or excessive.”

- c. **KCC 23.32.120** – Current language, that limits the Hearings Examiner's determination to only to whether civil penalties were assessed for any time period

after achieving compliance, would be eliminated by the proposed change to this section. However, new language makes it clear that an appellant cannot use a penalty appeal to litigate or re-litigate challenge the underlying basis for the an assessed penalty

As recognized by the court in Post, there is legitimate rationale behind limiting appeals to only whether the property owner had achieved compliance by a certain date: it avoids the specter of an appellant trying to “back door” a challenge to an earlier determination that she or he either had an opportunity to challenge and did not, or did challenge but lost. Post explicitly holds that one who fails to timely exercise a clearly available appeal right is not entitled to later litigate that issue, and precludes a party from re-litigating an issue on which they lost. The County Code already bars parties from raising challenges that should have been raised during an earlier appeal period, or were raised and rejected. The new language proposed in this section makes it clear in the penalty appeal context.

2. Content of Penalty Appeal Statements

KCC 23.32.100(B) – The current Code requires an appellant to describe “the violations for which civil penalties were assessed.” The proposed revision removes that requirement.

The current code is problematic. In one case, there were four separate deadlines the responsible party had to meet to avoid penalties, yet the penalty invoice provided no detail on which particular milestone(s) DPER believed the appellant failed to meet. Given that DPER possesses this type of knowledge and that the burden remains on the appellant to establish that penalties were improperly assessed even after code compliance, there can be no unfair surprise to DPER if this information in an appeal statement were removed.

3. Penalty Appeal Process

KCC 23.32.050 – This proposed revision would require a property owner to exhaust administrative appeals before filing a penalty appeal with the Hearings Examiner. The intent is to both incentivize for property owners to comply and conserving the appeals process for truly “final” DDES penalty decisions.

The current sequencing of penalty appeals functionally eliminates an effective tool for code enforcement officers to encourage compliance. Officers will often request billing for something less than the entire sixty days that DPER’s typical bills before beginning the abatement process. Seeing an actual bill (as opposed to simply warnings) often lights a fire under most property owners to redouble their compliance efforts, especially given the specter of soon-to-follow additional penalties. But knowing that each bill presents an appeal opportunity, some officers (for completely rational reasons) seem to have abandoned this measured step in favor of simply billing for the entire sixty days and thus only having to contend with a single penalty appeal per case. Once the entire sixty days are billed, the absence of imminent additional penalties removes an incentive for speedy compliance.

Moreover, the penalty appeal provisions do not require that a property owner use DPER's existing internal penalty waiver provisions. As current written, the Code allows a property owner to appeal the penalty invoice to the Hearings Examiner but also retaining the right to return to DPER and request a waiver under KCC 23.32.050. this approach is inconsistent with most administrative appeal processes.

The proposed revision, patterned after KCC 27.50.010(B).¹ In this case, DPER would review challenged penalties in-house through the pre-existing penalty waiver process, conserving the Hearings Examiner's time (and DPER time preparing for and participating in the appeal process). Where DPER issues penalties incrementally (for example, in two week blocks versus the entire sixty days) or other steps may follow (such as re-inspection fees or the permit process), DPER would be allowed to postpone its waiver decision and thus Hearings Examiner's involvement until the penalty phase has run its course. Finally, an appellant would not be appealing a devoid-of-explanation invoice, but DPER's final letter explaining its decision.

AMENDMENTS

None.

REASONABLENESS

The proposed legislation is a reasonable business decision to address issues outlined.

ATTACHMENTS

1. Proposed Ordinance 2013-0187

¹ That Code provision governs the sequencing of appeals of assessed project manager fee estimates. Under that provision, a permit applicant cannot appeal a fee estimate to the Hearing Examiner until after DPER's internal waiver process is complete.



Signature Report

1200 King County Courthouse
516 Third Avenue
Seattle, WA 98104

April 29, 2013

Ordinance

Proposed No. 2013-0187.1

Sponsors McDermott and Lambert

1 AN ORDINANCE relating to code enforcement penalties;
2 and amending Ordinance 13263, Section 9, as amended,
3 and K.C.C. 23.02.080, Ordinance 13263, Section 41, and
4 K.C.C. 23.32.050, Ordinance 13263, Section 55, and
5 K.C.C. 23.32.100, Ordinance 17191, Section 56, and
6 K.C.C. 23.32.110 and Ordinance 17191, Section 57, and
7 K.C.C. 23.32.120.

8 BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

9 SECTION 1. Ordinance 13263, Section 9, as amended, and K.C.C. 23.02.080 are
10 each hereby amended to read as follows:

11 A. Service of a citation, notice of compliance ((~~or~~)), notice and order or penalty
12 waiver decision shall be made on a person responsible for code compliance by one or
13 more of the following methods:

14 1. Personal service of a citation, notice of noncompliance ((~~or~~)), notice and
15 order or penalty waiver decision may be made on the person identified by the department
16 as being responsible for code compliance, or by leaving a copy of the citation ((~~or~~)),
17 notice and order or penalty waiver decision at that person's house of usual abode with a
18 person of suitable age and discretion who resides there.

19 2. Service directed to either the landowner ~~((and/))~~ or occupant of the property,
20 or both, may be made by posting the citation, notice of noncompliance ~~((or))~~, notice and
21 order or penalty waiver decision in a conspicuous place on the property where the
22 violation occurred and concurrently mailing notice as provided for below, if a mailing
23 address is available.

24 3. Service by mail may be made for a citation, notice of noncompliance ~~((or a))~~,
25 notice and order or penalty waiver decision by mailing two copies, postage prepaid, one
26 by ordinary first class mail and the other by certified mail, to the person responsible for
27 code compliance at ~~((his or her))~~ the person's last known address, at the address of the
28 violation~~((;))~~ or at the address of the person's place of business ~~((of the person responsible
29 for code compliance))~~. The taxpayer's address as shown on the tax records of the county
30 shall be deemed to be the proper address for the purpose of mailing such notice to the
31 landowner of the property where the violation occurred. Service by mail shall be
32 presumed effective upon the third business day following the day upon which the
33 citation, notice of noncompliance ~~((or))~~, notice and order or penalty waiver decision was
34 placed in the mail.

35 B. For notice and orders only, when the address of the person responsible for
36 code compliance cannot reasonably be determined, service may be made by publication
37 once in a local newspaper with general circulation.

38 C. Service of a stop work order on a person responsible for code compliance may
39 be made by posting the stop work order in a conspicuous place on the property where the
40 violation occurred or by serving the stop work order in any other manner permitted by
41 this section.

42 D. The failure of the director to make or attempt service on any person named in
43 the citation, notice of noncompliance, notice and order ~~((€))~~, stop work order or penalty
44 waiver decision shall not invalidate any proceedings as to any other person duly served.

45 SECTION 2. Ordinance 13263, Section 41, as amended, and K.C.C. 23.32.050
46 are each hereby amended to read as follows:

47 A. The invoice for civil penalties imposed under this title shall include a
48 statement advising the person responsible for code compliance that there is a right to
49 request a waiver from the director of some or all of the penalties.

50 B. Civil ~~((fines and civil))~~ penalties, in whole or in part, may be waived or
51 reimbursed to the payer by the director, with the concurrence of the director of the
52 department of finance, under the following circumstances:

53 1. The citation, notice and order, notice of noncompliance or stop work order
54 was issued in error;

55 2. The civil ~~((fines or civil))~~ penalties were assessed in error; or

56 3. Notice failed to reach the property owner due to unusual circumstances.

57 ~~((B-))~~ C. Civil ~~((fines and civil))~~ penalties, in whole or in part, may be waived by
58 the director, with the concurrence of the director of the department of ~~((finance))~~
59 executive services or ~~((it's))~~ its successor agency, under the following circumstances:

60 1. The code violations have been cured under a voluntary compliance
61 agreement;

62 2. The code violations which formed the basis for the civil penalties have been
63 cured, and the director finds that compelling reasons justify waiver of all or part of the
64 outstanding civil penalties; or

65 3. Other information warranting waiver has been presented to the director since
66 the citation, notice and order ~~((ø#))~~, notice of noncompliance, stop work order or penalty
67 invoice was issued.

68 ~~((C:))~~ D. In cases where additional penalties may be assessed, or where
69 compliance or other factors may provide a later ground for waiver, the director may
70 postpone consideration of the waiver request. New penalties may be assessed as
71 warranted, but interest shall not accrue on, and collection shall not be pursued for,
72 penalties subject to a pending waiver request.

73 E. When the director reaches a final determination on a waiver request, the
74 department shall provide a written decision to the person filing the waiver request, either
75 in person or by mail. The written decision shall inform the person of the right to appeal
76 the waiver decision and shall provide notice of the appeal deadlines and requirements
77 established in this chapter.

78 F. The director shall document the circumstances under which a decision was
79 made to waive penalties and such a statement shall become part of the public record
80 unless privileged.

81 SECTION 3. Ordinance 17191, Section 55, and K.C.C. 23.32.100 are each
82 hereby amended to read as follows:

83 A. ~~((The invoice for civil penalties imposed under this title shall include a~~
84 ~~statement advising the person responsible for code compliance that there is a right to~~
85 ~~appeal any civil penalties assessed for any time period after achieving compliance with a~~
86 ~~notice and order, stop work order or voluntary compliance agreement.)) A person who~~

87 filed a penalty waiver request under K.C.C. 23.32.050 may appeal the director's decision
88 denying all or a portion of the request waiver.

89 B. ~~((The person billed in an invoice for civil penalties who believes that civil~~
90 ~~penalties were assessed for a time period after achieving compliance may file an appeal~~
91 ~~with the department.))~~ In order to be effective, a written notice and statement of appeal
92 must be received by the department within fourteen days from ~~((the date of the invoice))~~
93 service of the director's penalty waiver decision. The statement of appeal must include:

- 94 1. The identity of the person filing the appeal;
- 95 2. The address of the property where the violations were determined to exist;
- 96 3. ~~((A description of the violations for which civil penalties were assessed; and~~
97 ~~4.))~~ A description of the actions taken to achieve compliance and, if applicable,
98 the date of compliance; and
- 99 4. Any other reasons why the person believes the penalties are erroneous or
100 excessive under the circumstances.

101 C. Failure to effectively appeal the ~~((assessment of civil penalties))~~ director's
102 penalty waiver decision within the applicable time limits renders the ~~((invoiced amount))~~
103 decision final.

104 SECTION 4. Ordinance 17191, Section 56, and K.C.C. 23.32.110 are each
105 hereby amended to read as follows:

106 ~~((The hearing examiner shall conduct a closed record hearing on the appeal of the~~
107 ~~assessment of civil penalties.))~~ The burden is on the appellant to demonstrate by a
108 preponderance of the evidence that civil penalties were assessed after achieving
109 compliance or that the penalties are otherwise erroneous or excessive under the

110 circumstances. If the hearing examiner grants the appeal, the examiner shall modify the
111 assessment of civil penalties accordingly. If the hearing examiner denies the appeal, the
112 assessed civil penalties shall be reinstated in full. The hearing examiner's decision is
113 final.

114 SECTION 5. Ordinance 17191, Section 57, and K.C.C. 23.32.120 are each
115 hereby amended to read as follows:

116 A. In an appeal of the assessment of civil penalties, the appellant may (~~only~~
117 ~~challenge whether civil penalties were assessed for any time period after achieving~~
118 ~~compliance. The hearing examiner's determination is limited to finding whether civil~~
119 ~~penalties were assessed for any time period after achieving compliance and to~~
120 ~~establishing the proper penalty dates if the appeal is granted~~) not challenge findings,
121 requirements or other items, that could have been challenged during the appeal period for
122 a citation, notice and order, notice of noncompliance, stop work order or earlier penalty.

123 B. The appeal of the assessment of civil penalties to the hearing examiner shall
124 be governed by K.C.C. chapters 20.24 and 23.36, except that where specific provisions in
125 this chapter conflict with KCC chapter((s)) 20.24 or 23.36, the provisions of this chapter
126 shall govern.

127 C. Upon the timely receipt of a statement of appeal, the assessment of civil
128 penalties shall be tolled pending the hearing examiner's decision. New penalties may be
129 assessed as warranted, but interest shall not accrue on, and collection shall not be pursued
130 for, penalties subject to a pending appeal. Should the hearing examiner deny or dismiss
131 the appeal, the civil penalties shall be applied retroactively from the date that compliance
132 was required in the notice and order, stop work order, voluntary compliance agreement or

133 the compliance dates set in the hearing examiner's decision on an appeal of a notice and
134 order.
135

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

Larry Gossett, Chair

ATTEST:

Anne Noris, Clerk of the Council

APPROVED this ____ day of _____, _____.

Dow Constantine, County Executive

Attachments: None