

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Enforcement)	
of Notices and Orders to Abate)	PL 08-0688 and
)	PL 10-0199
AVIS LLC, SKAGIT HILL)	
RECYCLING and SCOTT WALDAL)	ORDER RELATING TO
)	ASSERTION OF FIFTH
Respondents,)	AMENDMENT RIGHTS
)	
v.)	
)	
SKAGIT COUNTY,)	
)	
Petitioner.)	
_____)	

On January 11, 2012, on due notice, a hearing was convened at the Board of County Commissioners Hearing Room, to take up the matter of assessing civil penalties in relation to Notices and Orders to Abate issued to Avis LL, Skagit Hill Recycling and Scott Waldal (hereafter Waldal) by Skagit County Planning and Development Services on November 13, 2008 and May 5, 2010.

These Notices and Orders were the subject of an extended appeal hearing held over eleven days in June and July of 2010. The notices asserted nine code violations in total. In his decision, the Examiner affirmed seven of them.

The matter was subsequently appealed to the Board of County Commissioners and was resolved adversely to Respondent. The Commissioners upheld the Examiner in his findings that violations were committed by activities on site conducted without land use and building permits. The Commissioners reversed the Examiner on the existence of grandfather rights, meaning that County's ultimate decision was that such rights on the property do not exist. The Superior Court did not alter the County's decision, rendering it final.

In the Examiner's decision, dated August 23, 2010, he declined to assess penalties. The decision stated:

Should any determination of violation become final and the County elects to pursue enforcement of civil penalties, a new hearing before the Examiner shall be scheduled to deal with that matter.

In November of 2011, the County requested a hearing on the issue of civil penalties. The January 11, 2012 hearing was scheduled, on due notice, in response to this request. At the hearing, Scott Waldal stated that he was asserting his rights under the Fifth Amendment and

declined to participate further. Having been advised of Waldal's intentions late the previous day, the County presented a brief on the Fifth Amendment issue at the hearing.

The Examiner interpreted Waldal's action as, in effect, a motion to delay the instant proceeding until criminal charges against him have been resolved. The Examiner took this matter under advisement, in order to review the County's brief and reflect on the matter. However, he allowed the County to present evidence in support of imposing penalties.

The Examiner set a second potential hearing for January 25, 2012, and announced that he would decide the motion in the interim. The January 25th hearing was set for the purpose of allowing Waldal to present a case and to cross-examine the County's witnesses in the event that the decision on the motion were to go against him.

The Examiner has now had an opportunity to review the County's brief and to consider the issue. The instant Order denies Waldal's motion. Therefore, the hearing scheduled for January 25, 2010 shall be held, commencing at 9:00 a.m. at the Board of County Commissioners Hearing Room, 1800 Continental Place, Mount Vernon Washington. Waldal may then, if he so desires, present a case against the imposition of the penalties sought and may cross-examine the County's witnesses.

FINDINGS

1. Facts related to whether Waldal is entitled to use the site as a landfill/recycling facility or to sell material imported to the site have been fully adjudicated.
2. The criminal charges relate to dumping on the site which allegedly occurred on August 17 and August 18, 2010. The conclusion of hearings on the Notices and Orders to Abate, the subject of the instant request for penalties, was July 21, 2010. The Examiner was unaware of the criminal charges when he issued his decision on August 23, 2010. The violations were litigated based upon acts occurring prior to the alleged criminal acts.
3. Seven violations were sustained in the instant case, summarized as follows: (1) operation of a use that is not permitted in the zone and does not qualify as a nonconforming use; (2) alteration of a structure without approval; (3) occupying a structure not permitted for occupancy; (4) grading without a valid permit; (5) relocation of a commercial structure without a building permit; (6) unpermitted sale of solid waste, and (7) display of a sign with copy not strictly incidental to lawful use of the premises. These matters relate to violations of the land use and building codes.
4. The only issue in the instant penalty proceeding is when or whether the sustained civil violations were remediated. On the record previously made, three were remediated prior to the close of the June-July 2010 hearings.
5. The County did not refer to any facts involved in the alleged criminal incidents in presenting its case for penalties. Such acts were not used by the County to demonstrate that any of the violations found are ongoing.

6. The Hearing Examiner has no contempt powers. He cannot compel Waldal to testify. Waldal's decision about testifying in this civil matter is simply a matter of his own free choice.

7. Testimony given by Waldal in the previous hearings was not given under any claim of privilege.

8. Waldal's terse assertion of Fifth Amendment rights here was a blanket refusal to testify. It was not made in response to a request by the County that he testify, or in response to any particular questions.

CONCLUSIONS

1. The Examiner concludes that any testimony Waldal might choose to give would not be given under compulsion.

2. The blanket refusal to testify is not appropriate. Relevance to incrimination can be evaluated only in relation to particular questions.

3. The criminal case depends on particular facts relating to particular dates. Waldal's testimony in this penalty proceeding is not likely to be used against him in the criminal case unless he testifies about events and actions on the dates in question. His assertion of privilege should await specific inquiry about such matters.

4. The County has not attempted to put in evidence about activities on the dates when the criminal conduct was alleged to have occurred. Assuming the County is content to make its case on evidence not involving Waldal's testimony, there is no reason to hold these proceedings in abeyance pending outcome of the criminal case.

5. Therefore, these penalty proceedings should go forward, giving Waldal the opportunity to present evidence in his defense and to cross-examine the County's witnesses.

DECISION

Waldal's blanket assertion of Fifth Amendment rights is rejected. The civil penalty proceedings should go forward at the time and place announced above.

DONE, this 19th day of January, 2012.



Wick Dufford, Hearing Examiner