November 3, 2014

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AMENDED REPORT AND DECISION*

SUBJECT: Department of Permitting and Environmental Review File No. **E0800333**

RONALD MCGINNIS
Civil Penalty Appeal

Location: 63616 NE Index Creek Road, Gold Bar

Appellant: **Ronald McGinnis**
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Goldbar, WA 98251
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King County: Department of Permitting and Environmental Review
represented by **Jeri Breazeal**
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny in part, grant in part

EXAMINER PROCEEDINGS:

Hearing opened:	September 11, 2014
Hearing closed:	September 11, 2014
Record re-opened:	October 9, 2014
Record re-closed:	October 31, 2014
Report and decision issued:	September 18, 2014

*Paragraphs 1 through 27 are substantively unchanged from our September 18 transmittal, with only minor, stylistic edits. Paragraphs 28 to the end reflect a substantive change.

FINDINGS AND CONCLUSIONS:

Background

1. The current matter involves an appeal of penalties the Department of Permitting and Environmental Review (DPER) assessed to Ronald and Janet McGinnis this spring. As the penalties were issued pursuant to a 2010 DPER notice and order previously appealed to the Examiner's Office and the subject of a 2012 examiner decision, we start our analysis with the underlying notice and order.

2. Based on a neighbor complaint, DPER (in its previous incarnation as the Department of Development and Environmental Services) issued a May 3, 2010, notice and order to Ronald and Janet McGinnis. DPER alleged (a) accumulation of inoperable and operable vehicles and (b) a hazardous, damaged structure [a cabin] open to entry and in partial collapse. Mr. McGinnis timely appealed. The vehicles issue resolved in relatively short order, but the cabin went to hearing.

3. On July 12, 2012, the then-examiner issued a decision. (Ex. 6.) The examiner looked to both the Assessor's analysis that the property was "'unbuildable due to lack of enough area for septic system'" and should be discounted by 75 percent, and also to the Assessor's deletion of the cabin's assessed value and statement that "'it is apparent that the building will never be completed to even a minimal living standard.'" The examiner found that "the likelihood of obtaining Health Department approval for a septic system at this location appears to be remote."

4. The examiner then found the cabin "extremely hazardous," with the "the upper story of the unfinished structure about to topple and only restrained by a hardware store come-along anchored to the base of a nearby tree." (Exs. 6, 14.) He termed it "a disaster waiting to happen." He concluded that:

> The collapsing cabin cited in the notice and order constitutes an extreme hazard and must be removed immediately. No further delay can be justified based on the remote possibility that the Appellants may someday find a way to legally permit this deteriorating, unfinished and marginal structure.

5. The examiner denied the McGinnises' appeal and ordered that, "Demolition of the collapsed cabin shall be completed and all materials removed from the site by September 30, 2012." He closed with, "If the deadlines stated above are not met, DPER may assess penalties and fines against the property and [McGinnises] retroactive to the date of this order."

6. Mr. McGinnis filed a request for reconsideration with the examiner. On July 30, 2012, the examiner denied the request, reiterating that Mr. McGinnis would need to "complete demolition and removal by September 30, 2012." (Ex. 12.)

7. The McGinnises appealed the examiner's decision to superior court. On February 13, 2013, the court dismissed the McGinnises' action for failing to state a claim upon which relief could be granted and because the McGinnises had failed to comply with the statutory requirements for filing their action. (Ex. 8.) Mr. McGinnis believes the court "was entirely one-sided," and that "if it was the other way around and I claimed not to receive mail you can bet it [the court] would have favored Code Enforcement." (Ex. 3, letter of May 14, 2014.) He did not seek superior court reconsideration or appeal the court's dismissal.

8. Although the record does not specify exactly when, at some point during these events Mr. McGinnis demolished a portion of, but not all, of the structure pursuant to a demolition permit. Soon after the court's dismissal, on February 22, 2013, DPER wrote the McGinnises that they would need to "[d]emolish the remaining portion of the cabin and call for an inspection by May 1, 2013."

9. According to Mr. McGinnis, in early 2013 he discovered (in the remaining portion of the cabin) an old chimney with rocks and other specimens. In June 2013 he contacted Julie Koler, King County's historical preservation officer. DPER pushed back the compliance date somewhat to allow exploration of the historic angle. On March 21, 2014, Ms. Koler emailed DPER that there was no evidence warranting further investigation – or preservation – of the cabin for cultural significance, although there were some imbedded coins and rock from the fireplace that might be removed and given to a local historical society. (Ex. 10.)

10. DPER contacted Mr. McGinnis and gave him thirty days to comply. (Ex. 1, testimony.) After inspecting on May 8 and finding a portion of the cabin still standing, DPER issued a penalty invoice for $3,882.09. (Exs. 1, 4). Mr. McGinnis first sought a waiver from DPER, which DPER denied on June 19. Mr. McGinnis timely appealed on July 6. The case went to hearing before the undersigned on September 11.

Analysis

11. When an examiner considers a penalty appeal, "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). We first analyze whether the property was actually in compliance as of the May 15, 2014, date of civil penalties, then turn to whether there is some other reason why the penalties are erroneous, and finally answer whether the penalties are excessive.

12. One of Mr. McGinnis's consistent themes is that the-then examiner got it wrong in July 2012. Mr. McGinnis asserts that, in the initial appeal proceeding, DPER presented a skewed case about the state of the cabin, that DPER had already agreed the property was in compliance, and that the hearing was not fair. Even assuming, for the sake of argument, that the examiner was incorrect in his initial decision and in denying the McGinnises' motion for reconsideration, and that the court was incorrect in dismissing the McGinnises' appeal, the examiner's decision became final after the period for appealing the superior court dismissal ran out. It cannot be collaterally attacked in this

penalty proceeding. The examiner's decision is the hand DPER, the McGinnises, and the undersigned have been dealt for purposes of deciding the current penalty appeal.

13. Mr. McGinnis asserts that the cabin was actually a duplex, with a two-story portion and a single story portion, as depicted in Exhibit 13. Mr. McGinnis states that there was no interior entry between the single- and two-story areas, there were separate outhouses for each portion, and that each had its own mailbox. We accept as true his unrebutted assertions, and that distinction plays into our analysis in paragraphs 26 to 27. But a duplex is still a structure, and nothing in the examiner's original decision or decision on reconsideration suggests the Mr. McGinnis was allowed to retain a portion of the structure. The duplex argument perhaps provides a rationale for asserting that the examiner's original decisions were incorrect, that he should have only ordered demolition of part of the structure. But Mr. McGinnis cannot now challenge what the examiner decided in July 2012.

14. The record contains a copy of the demolition permit with a June 14, 2012, stamp with a DPER inspector's initial that the demolition permit was receiving its final approval. (Ex. 3.) Mr. McGinnis argues that this was definitive and should have ended the matter. It is not necessarily true that an initialed permit will always wrap up a code enforcement case. But had the inspector initialed the permit *after* the examiner's July 12, 2012, decision or July 30, 2012, denial of reconsideration, there would be an argument that the initials qualified as DPER's final interpretation that the examiner-ordered demolition had been satisfactorily complied. As the approval came *before* the examiner's July 2012 rulings, it is only another argument that the examiner might have been incorrect. Again, the examiner's decision became final after the period for appealing the superior court dismissal ran out, and it cannot be collaterally attacked in this penalty proceeding. The examiner's July 2012 rulings, not DPER's prior pronouncements, were the definitive county word on the subject.

15. On a related note, one of the more contentious sub-disputes in this very contentious matter relates to the scope of that demolition permit. Per letter of December 10, 2011, Mr. McGinnis asserts that he had applied for a "partial demolition permit" on April 15, 2011, but that DPER's issued permit incorrectly listed the permit as "total." (Ex. 3, letter of December 10, 2011.) Similarly, two weeks after the building official had initialed the demolition permit as approved, Mr. McGinnis re-raised the partial/total demolition issue and demanded that Code Enforcement sign off on the partial demolition. (Ex. 3, letter of June 30, 2012.)

16. The record reflects an application form describing the project as "DEMO OF EXISTING STRUCTURE TO FOUNDATION," apparently filled out, dated and signed by Mr. McGinnis on December 1, 2011. (Ex. 16.) However, Mr. McGinnis asserted at hearing that the demolition permit application in the file was *not* the permit paperwork he actually submitted. He says that what he actually filled out was a form that added "LEAVING 1ST STORY BLDG. DEMO SEPARATE DAMAGED TWO STORY BUILDING" after "DEMO EXISTING STRUCTURE TO FOUNDATION," and that he did not sign the application form he originally submitted. (Mr. McGinnis attached the form with the longer project description to Exhibit 3, but with the date and place for the signature cut off.)

17. Mr. McGinnis did not quite say it, but there seemed to be an implication that perhaps someone at DPER altered his original permit application to remove the second line of his request and to add his signature. If actually an accusation, it would be one of the strangest. Yet it would not one we would need to wade into, for whatever the precise project description Mr. McGinnis employed when he originally applied for a demolition permit, a DPER inspector approved the demolition permit (with the one-story portion of the cabin intact) in June 2012. As noted above, the inspector's approval pre-dated the examiner's July 2012 rulings. The examiner's action, for good or for bad, was the final county statement on what demolition was required. The property was not in compliance with the examiner's rulings.

18. Next, Mr. McGinnis argues that the penalties were erroneous due to a delay in assessing the potentially historic nature of the cabin or its chimney. Mr. McGinnis states that in early 2013 he discovered some historic artifacts involving an old chimney in the remaining portion of the cabin. Mr. McGinnis contacted Julie Koler, King County's historical preservation officer, and Michael Houser, the state's Architectural Historian, about the remaining portion of the cabin and its chimney. DPER pushed back the compliance date again, this time to allow some exploration of the historic angle.

19. Fast forwarding to 2014, on March 21, Ms. Koler sent DPER an email that the archeologist

> did not find the physical evidence to warrant further investigation – or preservation – of the cabin for cultural significance. [The archeologist] did, however, recommend that prior to demolition the fireplace feature that has the imbedded coins and rock be removed and given to the local historical society. (Ex. 10.)

20. DPER gave Mr. McGinnis thirty days to come into compliance. After visiting the site on May 8 and seeing the old portion of the cabin remaining, DPER issued penalties on May 15.

21. On May 22, the state's Mr. Houser emailed Mr. McGinnis that, "While your cabin certainly has some interesting stories tied to it and the unusual chimney, it will not qualify" for historic registry. (Ex. 3.) He suggested that a local historic organization "might be interested in pieces of the chimney" and or any documents Mr. McGinnis might have. (Ex. 3.)

22. On May 21, Ms. Koler emailed Mr. McGinnis that "the cabin isn't eligible for historic designation and that the best course is to donate the coins and rock embedded in the chimney to one of the local historical societies." (Ex. 3.) Mr. McGinnis apparently contacted her again, and she confirmed on June 2 that "the cabin/fireplace element do not meet the criteria for landmark designation." (Ex. 3.)

23. To Mr. McGinnis, no penalties could have been assessed until after Ms. Koler's June 2 email, as in his mind the "cabin issue was under her control" until that point. (Ex. 3, p. 8 of appeal.) While not illogical, that is not correct. Unlike an examiner handling an appeal of a DPER notice and order, neither Ms. Koler nor Mr. Houser had "control" of the cabin. Assuming DPER had authority to extend the examiner-ordered demolition much beyond the superior court's dismissal of the McGinnises' appeal, when DPER received Ms.

Koler's March 21 email, it promptly advised Mr. McGinnis that he had thirty days to comply. (Ex. 1, testimony.)

24. Mr. McGinnis did not accept DPER's decision on the matter and so, at the end of March he contacted Mr. Houser. (Ex. 3, May 31, 2014, letter at p. 3.) He also re-contacted Ms. Koler at some point before her May 21 email, and then, again before her June 2 email. And despite their responses to him, he continues to believe that the chimney and wall art have been "verified as a Historical Artifact" by Ms. Koler and Mr. Houser. (Ex. 3, appeal statement at p. 4.)

25. Again, DPER, not a state agency or another county agency, was the only agency with "control" of the compliance deadline. On March 21 DPER explained that the history-related postponement was at an end, giving Mr. McGinnis thirty days to complete compliance. And DPER did not assess penalties until May 15, almost two months later. The historical angle is not a basis for concluding that DPER's penalty assessment was erroneous.

26. And that brings us to our third review: even if the property was not in compliance and DPER's decision to issue penalties was not erroneous, were the penalties excessive under the circumstances. As noted above, the then-examiner found that the structure was "extremely hazardous," with the "the upper story of the unfinished structure about to topple and only restrained by a hardware store come-along anchored to the base of a nearby tree." (Ex. 6; illustrated in Ex. 14.) He found it "a disaster waiting to happen," and an "extreme hazard." But, by the date DPER issued penalties, Mr. McGinnis had already removed that portion of the cabin the examiner cited to as the most troubling. And it appears from the photos that the remaining cabin area is sealed to entry. (Ex. 3.)

27. We conclude that some reduction in penalties is warranted, given Mr. McGinnis' partial compliance. Stated another way, $3880 is the correct penalty that would have attached if Mr. McGinnis had done nothing and allowed the entire structure – including the "extremely hazardous… about to topple… disaster waiting to happen" portion – to remain. Thus, $3880 seems excessive in light of his partial demolition. We conclude that, in light of the circumstances of this case, half the assessed penalty should be reduced.

28. After reducing the penalties in our September 18 opinion, we turned to "next steps." We reasoned that, with the remaining portion of the structure unoccupied and secured against entry, the current situation posed significantly less risk than did the original scenario and that, all else equal, it was probably better that the chimney be preserved than demolished. We ordered that as long as the remaining portion of the cabin remained unoccupied and closed to entry and no new hazard emerged, the cabin could remain while Mr. McGinnis continued pursuing the necessary permits that might allow for a replacement cabin incorporating the chimney.

29. On October 2, Mr. McGinnis appealed to superior court. On October 9, DPER filed a request for reconsideration with the Examiner, challenging not the penalty reduction but the "next steps." Under the Land Use Petition Act (LUPA), DPER's timely motion for reconsideration stayed the appeal period. We allowed time for Mr. McGinnis to respond to DPER's motion and then for DPER to reply.

30. DPER and Mr. McGinnis assert various reasons why our "next steps" analysis was either good or bad on the facts of this case. However, we do not reach that analysis because we

conclude that we had no jurisdiction to address those "next steps" in a penalty appeal case. We trace the code language that commands this result.

31. If a code enforcement dispute is fully litigated, it typically passes through three phases – violation, penalties, and abatement. In the initial, violation stage of examiner involvement, such as on an appeal of a notice and order, an examiner can impact the latter two stages. Even where the examiner finds a violation has occurred, he or she may modify the notice and order; penalty and abatement language are standard parts of a notice and order. *See, e.g.*, KCC 23.36.030.A; Ex. 5, page 2. Thus, an examiner decision on a notice and order often includes penalty-related language, as the 2012 examiner decision here did. *See, e.g.*, Ex. 6, page 3. Similarly an examiner decision on a notice and order may also include abatement-related language. *See, e.g.*, KCC 23.36.030.B. It seems logical that if an examiner may, at the initial violation stage, weigh in on violation, penalty, and abatement matters, an examiner at the penalty stage may weigh in on both penalty and abatement matters.

32. Yet, on closer review, that is not how the code is structured. A penalty appeal is an appeal of a denied penalty waiver request. KCC 23.32.100.A. The examiner decides whether the penalties were assessed after achieving compliance, were otherwise erroneous, or were excessive under the circumstances; if so, the examiner may modify the penalties. KCC 23.32.110. The only explicitly grant of authority KCC 23.32.100-.120 gives an examiner is to weigh in on penalties. And an examiner has only the authority granted us by ordinance. *HJS Dev., Inc. v. Pierce Co.*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003).

33. The wording of the penalty-appeal specific language of KCC chapter 23.32 does not end the analysis – we would normally look to the broader examiner powers contained in KCC chapters 23.36 and 20.24 to augment the limits of examiner authority. But KCC 23.32.120.B unequivocally states that, in the event of a conflict between those three chapters, KCC 23.32 "shall govern." So in the conflict between the narrow scope of examiner powers under the penalty chapter and the broader scope of examiner powers in those other chapters, the narrower prevails. Thus we simply did not have the authority to weigh in on "next steps" as we did in paragraphs 28 through the end of our September 18, 2014, opinion.

34. DPER's motion for reconsideration is granted.

DECISION:

1. Mr. McGinnis' appeal is denied in part and granted in part. The penalty shall be reduced from $3,822.09 to $1911. Provided that by **December 15, 2014**, Mr. McGinnis follows the steps discussed in DPER's June 23, 2014, letter (Ex. 3) and either completes payment or enters into a plan with DPER's abatement manager, Elizabeth Deriatus, no finance charges, collection fees, interest, or legal costs shall be added to this amount. If Mr. McGinnis fails to meet the **December 15, 2014**, deadline, or the terms of any agreed-upon plan, DPER may follow its normal collection procedures.

ORDERED November 3, 2014.

David Spohr
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Pursuant to King County Code Chapter 20.24, the King County Council has directed that the Examiner make the final decision on behalf of the county on these appeal matters. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are property commenced in superior court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE SEPTEMBER 11, 2014, HEARING ON THE APPEAL OF RONALD MCGINNIS, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. E0800333.

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Jeri Breazeal and Ronald McGinnis.

The following exhibits were offered and entered into the record:

Exhibit no. 1	DPER staff report to the Hearing Examiner
Exhibit no. 2	Waiver/adjustment decision signed June 19, 2014
Exhibit no. 3	Appeal of waiver/adjustment denial filed July 9, 2014
Exhibit no. 4	Billing statement dated May 15, 2014
Exhibit no. 5	Notice of violation dated May 3, 2010
Exhibit no. 6	Examiner report and decision dated July 12, 2012
Exhibit no. 7	Letter from DPER to Appellant dated July 30, 2012
Exhibit no. 8	Order entering King County's motion to dismiss signed February 13, 2013
Exhibit no. 9	Letter from DPER to Appellant dated February 22, 2013
Exhibit no. 10	Email from Julie Koler to Jeri Breazeal sent March 21, 2014
Exhibit no. 11	Photographs of subject property taken May 8, 2014
Exhibit no. 12	Letter from Stafford Smith, Hearing Examiner pro tem, dated July 30, 2012
Exhibit no. 13	Photographs of subject property
Exhibit no. 14	Photographs of subject property
Exhibit no. 15	Appellant package of materials
Exhibit no. 16	Appellant package of materials

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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review File No. **E0800333**

RONALD MCGINNIS
Civil Penalty Appeal

I, Ginger Ohrmundt, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **AMENDED REPORT AND DECISION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties of record/interested persons and primary parties with e-mail addresses on record.

☒ caused to be placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties of record/interested persons at the addresses indicated on the list attached to the original Certificate of Service.

☒ caused to be placed with the United States Postal Service, with sufficient postage, as CERTIFIED MAIL with a return receipt requested in an envelope addressed to the primary parties.

DATED November 3, 2014.

Ginger A. Ohrmundt
Legislative Secretary II

All Parties of Record

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