December 10, 2015

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REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review File No. **E0900317**

DOUG AND SUE HOFFMANN
Civil Penalty Waiver Appeal

Location: 8816 SW Cemetery Road, Vashon

Appellants: **Douglas and Susan Hoffman**
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King County: Department of Permitting and Environmental Review
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SUMMARY OF RECOMMENDATIONS/DECISION:
Department's Preliminary Recommendation: Deny appeal
Department's Final Recommendation: No strong recommendation as to #1; deny appeal as to #2
Examiner's Decision: Grant appeal as to #1; deny appeal as to #2 but reduce penalty

EXAMINER PROCEEDINGS:
Hearing Opened: December 3, 2015
Hearing Closed: December 3, 2015

FINDINGS, CONCLUSIONS AND DECISION:
Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS AND CONCLUSIONS:

Introduction

1. In October 2014, the Department of Permitting and Environmental Review (DPER) served a notice and order (Order), asserting #1 that the Hoffmans were operating a materials processing facility and/or materials processing for personal use and within critical areas, and #2 construction of an accessory structure within critical areas, all without the necessary permits. The Hoffmans timely appealed. We went to hearing in January 2015.

2. On January 20, 2015, we issued a Report and Decision (Decision) sustaining the bulk of DPER's Order. Ex. 6.[1] To achieve compliance and avoid penalties, the Hoffmans could (by April 30, 2015) either apply for permits or could "[c]ease any materials processing and remove the related equipment from the back area" and "[t]ake down the structure." Ex. 6 at 5.

3. DPER concluded that the Hoffmans were not in compliance, and issued $11,700 in penalties ($7,200 for materials processing and $4,500 for construction). The Hoffmans timely requested a penalty waiver, which DPER denied. The Hoffmans timely appealed. Ex. 3. We went to hearing on December 3. We seek to determine whether the Hoffmans have "demonstrate[d] 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.

Violation #1 (Materials Processing) Analysis

4. At hearing DPER called Scott Engelhard, who testified that the Hoffmans had not ceased operations.[2] The main event Mr. Engelhard testified to involved nine hours of materials processing on October 7. Especially given Mr. Hoffman's rebuttal testimony that he kept all the ground-up materials from that day onsite, and the warm up and cool down periods the grinder needs, that event appears to substantially comply with our allowance that "for up to eight hours on one day in any calendar year, the Hoffmans may process organic materials on the subject property, so long as the resulting mulch is used on the subject property or their adjacent homesite." October 7 was 2015's day.

5. More importantly—and this goes to Mr. Engelhard's assertion that he heard the Hoffmans grinding on two additional days after the April 30 deadline—only DPER can assess penalties. While DPER could presumably assess penalties in the future, if it concludes that materials are again being processing on the property (beyond one day per calendar year), that was not the reason it assessed penalties here. DPER did not assert that

[1] DPER had asserted that the both the materials processing and the construction were in several environmentally critical areas. We sustained the violation as to one critical area (critical aquifer recharge area) but denied it (for insufficient evidence) as to the other critical areas.

[2] While we were at the hearing, neighbor Kerrie Grace emailed the office inbox, asserting (as Mr. Engelhard did) that the Hoffmans had continued materials processing beyond the deadline. In addition to the Hoffmans' lack of opportunity to cross-examine her, in an appeal hearing only the parties generally may submit evidence. Mr. Engelhard's testimony was offered as part of DPER's presentation and was subject to cross-examination; Ms. Graces's was not. We do not admit or consider Ms. Grace's email.

the Hoffmans had failed to comply with the "[c]ease any materials processing" portion of our Decision, but instead with the "and remove the related equipment from the back area" component. So that is where we focus.

6. DPER's theory for assessing penalties on Violation #1 was that materials associated with the materials processing business remained in the rear of the property. This in true as an undisputed matter of fact—there was a large stockpile of woody materials (such as stumps) left over from commercial processing operations, materials that remained on site until Mr. Hoffman processed them on October 7. Ex. 5, photo A. Conceivably our Decision should have ordered these materials removed by April 30; after all, they were part of the commercial, materials processing business. But we did not. The only thing we required removed was "equipment." And the woody heap was not "equipment."

7. There is no real dispute that Mr. Hoffman removed the grinder from the back area by the deadline, while other, business-related equipment remained on the subject property after the deadline. Ex. 5, photos C. & D. Mr. Hoffman testified, without objection, that these are located on the *front* part of his property and relate to the excavation/landscaping business he continues to operate (as a home occupation) on that front area. As we had noted in our Decision, the home occupation the Hoffmans conduct on the front area was not part of DPER's Order and thus was not an issue we ruled on. Ex. 6 at 4. Similarly, it is not part of the current penalty appeal.

8. The officer who visited the area and took the June photos had departed DPER's service prior to last week's current hearing, and thus was not available to explain what the photos represented—if indeed it differed from Mr. Hoffman's explanation. The supervisor who attended the hearing had no evidence to the contrary and essentially conceded the point.[3] Here the Hoffmans have shown that the penalty for Violation #1 was assessed after they achieved compliance. Their appeal is granted as to $7,200 of the penalty.

Violation #2 (Construction of a Structure) Analysis

9. DPER's Order had required the Hoffmans to either apply for permits for the structure or obtain a demolition permit to remove the new construction and then complete the demolition. We denied the Hoffmans' appeal of that Order, but with two caveats. The caveat related to critical areas is not related to penalties.[4] The relevant caveat was that DPER had agreed at the January hearing that the Hoffmans could remove the structure without a demolition permit. We directed that by April 30 the Hoffmans either apply for permits to keep the structure or "[t]ake down the structure." Ex. 6 at 3–5.

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[3] Neighbor Engelhard candidly agreed that he too did not have contrary information contradicting Mr. Hoffman's assertion that the equipment depicted in Exhibit 5, photos C. and D., was located on the back area. Similarly, at the time the photos were taken, Mr. Hoffman was storing some steel I-beams in the back area. Ex. 5, photo B. Here too, there is nothing to contradict Mr. Hoffman's assertion that these were unrelated to materials processing or to his continuing business, but were instead for a potential construction project he was considering for his own property. (He has since abandoned the project and removed the I-beams.)

[4] The caveat not related to the penalty discussion is that we found the construction occurred in only one of the two critical areas DPER asserted. Ex. 6 at 3. Some portion ($15 per day for the first thirty days, doubling the next month) of the penalty was attributable to "environmental damage risk." See Ex. 3, KCC 23.32.010.A.1.b.3.b. But because we sustained a critical areas violation, not finding another critical area did not change the penalty structure. And the Hoffmans have not challenged DPER's calculation.

10. By the time the DPER officer visited the site in June, the Hoffmans had removed the plastic sheeting. Ex. 5, photo A. The Hoffmans' statement of appeal asserted that they were in compliance because they "[r]emoved PVC tarp, as per King County building code 21A.06.125, making it not a building." Ex. 3, final page. The referenced code section defines a building as "any structure having a roof." KCC 21A.06.125. But DPER's Order was for the unpermitted construction of a "structure," not a "building," and our Decision sustained that violation.

11. At hearing, the Hoffmans shifted their argument, asserting that prior to the compliance deadline they disconnected the tie downs and moved the structure a few feet. The code defines a structure as "anything permanently constructed in or on the ground, or over the water; excluding fences six feet or less in height, decks less than 18 inches above grade, paved areas, and structural or non-structural fill," KCC 21A.06.1255. Thus, the Hoffmans argue that they timely achieved compliance because their construction was no longer "permanently constructed" and thus was not a "structure."

12. On its face, that cannot be the correct code interpretation. If so, someone could construct a building pad a few feet larger than the dimensions of the desired building, construct the building, slide the building a few feet every few months, and continually avoid the need to get an otherwise-required permit.[5] More importantly, that is not the question we face today. At the January hearing we went into detail on whether the Hoffmans' construction qualified as a "structure." We observed that even though the building was not constructed with permanence in mind (as a dictionary defines "permanent") and even though it could be easily moved, having been in continuous operation for more than sixty days it was "permanent"; it thus required a permit. Ex. 6 at 3 (citing KCC 21.06.1345, .1347).

13. Therefore our issue today is not whether, had he unhooked the anchoring and moved the building a few feet within sixty days of initial construction, his construction would ever have become a "structure." It is not even how, he had taken those steps beyond sixty days from the initial construction but prior to the January hearing, we would have ruled in January. Instead, in January we sustained Violation #2 and denied the appeal. The only caveat and modification we made to DPER's Order was that while DPER had required that the Hoffmans apply for a demolition permit to remove the new construction, we determined that they could do the work without a demolition permit. We phrased our directive, "Take down the structure," not "modify the structure to come into compliance" or something more ambiguous. Just as our directive to remove from the back area the "equipment" related to materials processing was clear (and eliminates DPER's theory on violation #1 penalties), our directive to "take down" the structure was clear (and eliminates the Hoffmans' theory on violation #2 penalties).

14. DPER did not assess penalties after the Hoffmans achieved compliance, and the penalties were not otherwise erroneous. *Cf.* KCC 23.32.110. As to whether they were "excessive under the circumstances," they were not at the points DPER assessed the penalty and later denied the Hoffmans' waiver request. But one ground for reducing a penalty is when the violation has been cured. KCC 23.32.050.C.2. Between the time DPER denied the waiver and last week's hearing, Mr. Hoffman actually took down the structure (meaning

[5] The scenario is thus different from something like an events tent, which is periodically taken down and folded.

he disassembled it into non-standing parts). So instead of DPER having to transfer the case to its Abatement Manager, necessitating the expenditure of County resources, Mr. Hoffman's dismantling has wrapped up this code enforcement case. And those saved County resources are worth something. We knock $1,000 from the $4,500 penalty for #2.

Miscellaneous Point

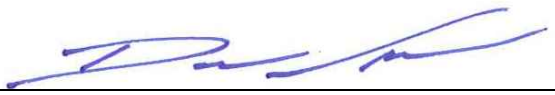
The above does not, of course, bring peace to the neighborhood. The tension so apparent between the neighbors and Hoffmans at the January hearing appeared largely unabated at last week's hearing. And there is always the potential for fresh code enforcement complaints (in either direction). We suggest again, as we did in our January Decision, that either the Hoffmans or one of the neighbors might wish to contact the Ombudsman's Office or some other dispute resolution provider to attempt to achieve a more satisfactory (to everyone), neighbor-to-neighbor resolution.

DECISION:

1. The appeal related to the $7,200 penalty for violation #1 (materials processing) is granted.

2. The appeal related to the $4,500 penalty for violation #2 (construction of a structure) is denied in part, but granted as to $1,000 of that penalty because the Hoffmans have recently come into compliance.

ORDERED December 10, 2015.



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 regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly 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 DECEMBER 3, 2015, HEARING IN THE APPEAL OF DOUG AND SUE HOFFMANN, PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. E0900317.

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Sheryl Lux, Doug Hoffman, Sue Hoffman, and Scott Engelhard.

The following exhibits were offered and entered into the record:

Exhibit no. 1	Department Permitting and Environmental Review staff report to the Hearing Examiner for file no. E0900317.
Exhibit no. 2	Waiver Denial letter issued September 21, 2015
Exhibit no. 3	Notice and Statement of Appeal, received October 8, 2015
Exhibit no. 4	Codes cited in the Notice and Order
Exhibit no. 5	Photographs of subject property taken by Mary Impson on June 9, 2015
Exhibit no. 6	Hearing Examiner's Report and Decision on Notice and Order Appeal issued January 30, 2015

DS/ED

December 10, 2015

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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review File No. **E0900317**

DOUG AND SUE HOFFMANN
Civil Penalty Waiver Appeal

I, Elizabeth Dang, 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 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 December 10, 2015.

Elizabeth Dang
Legislative Secretary

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