July 13, 2015

OFFICE OF THE HEARING EXAMINER
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REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review File No. **ENFR140967**

TIM SCHAEFER AND PACIFIC STATES CONDOS (PENALTY)
Code Enforcement Penalty Appeal

Location: 35620 SE 252 Street Ravensdale, WA

Appellant: **Tim Schaefer**
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Ravensdale, WA 98051
Telephone: (206) 296-6604
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Department: **Holly Sawin**
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	July 9, 2015
Hearing Closed:	July 9, 2015

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

FINDINGS AND CONCLUSIONS:

1. This is the third examiner decision involving the subject property, on which sits the old school house for the historic mill town of Selleck. In 2011, the then-examiner found that the school house had been illegally converted into habitable space; he ordered it not to be used as a residence until it received the necessary permits. Exhibit 9.

2. In 2014, Tim Schaefer began constructing a structure in the back of the property, without first obtaining a permit. DPER served a November 19 stop work order. Exhibit 11. Mr. Schaffer did not appeal. DPER then served a December 17 notice and order. Exhibit 6. Mr. Schaefer appealed the notice and order, arguing that he had attempted to apply for a permit for the back building, but that DPER had refused to accept his application. Exhibit 7. He asked us to order DPER to accept his application. *Id.*

3. In our April 6, 2015, decision we analyzed Mr. Schaefer's argument that DPER should have accepted his permit application for the back building because the back building would be accessory to a primary use of his property as agricultural. Exhibit 8. We found that "Mr. Schaefer was not intending to establish the primary use of the property as agricultural, given his goal of establishing the school house as residential;" we rejected the argument that DPER should have accepted his building application. See, e.g., *id.* at p. 2, ¶ 2; p. 4 n.2. We upheld the notice and order and denied the appeal. *Id.* at p. 4, ¶ 1.

4. The current case involves Mr. Schaefer's appeal of a $550 penalty he received for allegedly violating that stop work order. Our role is to determine whether he has met his burden of demonstrating that those penalties were assessed after he achieved compliance, were otherwise erroneous, or were excessive under the circumstances. KCC 23.32.110.

5. The unappealed stop work order required that Mr. Schaefer cease construction of the back building until he applied for a permit. Exhibit 11. There is no question that he continued construction without applying for a permit. (His post-stop work order activities are discussed below.) He does not argue that penalties were assessed after he achieved compliance. Instead, he offers two grounds for why the penalties are erroneous. Both relate to his assertion that he was essentially forced into that non-permitted, post-stop work order construction because DPER wrongly refused to accept his permit application.

6. First, as with the notice and order appeal, Mr. Schaeffer's "central" contention is that DPER wrongly interpreted the primary/accessory use concept, that his primary use of the subject property is agricultural, and that DPER should have accepted an application to permit the back building as an accessory agricultural structure. Exhibit 1, cover page and "Exhibit B"; Schaeffer testimony.

7. DPER responds that such a defense is beyond the scope of a penalty appeal, and that the only question is whether Mr. Schaefer continued working on the property after receiving the stop work order and before obtaining a permit. As a general matter, that is not correct.

8. If, for example, the procedural history of this case had been different, and there had been no earlier notice and order, then Mr. Schaefer would not have had the opportunity to assert that DPER was wrongly refusing to accept his permit application. The rule that, in a penalty appeal, an "appellant may not challenge findings, requirements or other items, that could have been challenged during the appeal period for a citation, notice and order, notice of noncompliance, stop work order or earlier penalty," KCC 23.32.120.A, would not have barred such a claim. It would have been fair game in this penalty appeal.

9. That is not, however, the procedural history of this case. As discussed above, DPER did issue a notice and order. Not only *could* Mr. Schaefer have challenged DPER's "improper" rejection of his permit application in that proceeding, but, as discussed above, he actually did challenge it. We conducted an open record hearing (which included extensive testimony), upheld the notice and order, and denied his appeal. This round, Mr. Schaefer makes a more polished argument for why DPER should have accepted his permit application. But he does not argue that any circumstances have changed since our April decision; for example, he points to no additional steps he has recently taken to establish the primary use of the property as agricultural. (DPER actually issued the penalty on March 19, before our April 2 hearing that resulted in our April 6 decision.) He is really arguing that DPER and the undersigned got it wrong the first round. And KCC 23.32.120.A, not to mention basic principles of *res judicata*,[1] prevents him from getting a second bite at the apple in a penalty appeal.

10. Mr. Schaefer next asserts that the penalty was erroneous because, once DPER refused to accept his application, he functionally had no choice but to do more work on his partially-constructed back building, lest his initial construction be destroyed by winter winds and driving rains. Exhibit 1, "Exhibit A"; Schaefer testimony. He described his unsuccessful efforts to protect the building from rain damage by first installing a tarp over the building and then, when that failed, installing plywood. *Id.* Only when the plywood failed did he place a roof on the structure. *Id.* And only when he discovered that even the roof was not stopping rain coming in from the side did he install siding. *Id.* Had he not done so, rain would have destroyed his work. *Id.*

11. DPER did not contest the factual assertions in the last four sentences, and we accept them. We also accept Mr. Schaefer's explanation that he did not add roofing to defy the stop work order, but instead to mitigate his damages. *Id.* And his analogy to being a doctor in the middle of surgery told to cease performing the operation, facing the dilemma of letting the patient bleed to death or continuing the surgery, is a good one.

12. Yet the fact that Mr. Schaefer made a logical decision to prevent extensive building damage by installing roofing and siding in violation of the stop work order does not mean DPER's penalty was erroneous. Mr. Schaefer began construction without obtaining the

[1] *Res judicata*, the doctrine that prevents a party from relitigating a claim that was raised or could have been raised in an earlier action, is an equitable doctrine. *Stevens County v. Futurewise*, 146 Wn. App. 493, 192 P.3d 1, 6 (2008). And unlike a court, an examiner generally lacks jurisdiction to consider equitable issues. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 640, 689 P.2d 1084 (1984). Yet even for a tribunal with no general, equitable authority, *res judicata* may be in a different category, an equitable doctrine "necessary" to carrying out statutorily-delegated authority and one the tribunal has "implied" authority to apply. *Cf. Irondale Community Action Neighbors v. Western Washington Growth Management Hearings Bd.*, 163 Wn. App. 513, 523, 262 P.3d 81 (2011).

necessary permits. Staying with the surgeon analogy, if the surgeon discovered mid-surgery that she had not obtained the necessary patient approval, her best option might be to continue working to stem the bleeding and stabilize the patient. But that would not mean she would face no legal repercussions. Or, to use another analogy, having painted himself into a corner by starting construction with obtaining the necessary approvals, Mr. Schaeffer may have made a prudent decision to walk over the wet paint. But again, that does not mean there are no repercussions. DPER's penalty was not issued in error.

13. The only other grounds for appeal would be that the penalty was excessive under the circumstances. KCC 23.32.110. Penalties for violating a stop work order accrue from the first day the stop work order is violated until the work actually stops. KCC 23.28.030.B. Given the work Mr. Schaeffer described and the time that likely elapsed between his first post-stop work efforts and completion, DPER theoretically could have issued thousands (if not tens of thousands) of dollars in fines. Had they done so, and given his reasons for shoring up the building, excessiveness would surely have been an issue in this penalty appeal. But here DPER only fined him the $550 fine applicable to a *single* day of construction. DPER's fine was not excessive.

14. Thus Mr. Schaefer has not demonstrated that the $550 penalty at issue here was assessed after achieving compliance, was erroneous, or was excessive. KCC 23.32.110.

15. Finally, Mr. Schaefer expressed concerns that, because DPER is still not accepting his application to permit the back building as a structure accessory to a primary use of the property as agricultural, he will face future (and far greater) penalties in relation to the notice and order and to our April decision. We are not, in this decision, stating that he could take no steps *in the future* to establish the primary use of the property as agricultural, thus reshuffling the deck on whether DPER should later accept an application to permit the back building as an agricultural accessory structure.

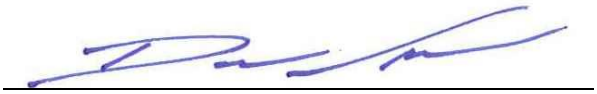
16. Thus, conceivably, if Mr. Schaefer (a) took additional steps to establish the primary use of the property as agricultural, and (b) obtained Public Health's approval for the back building (Public Health approval typically being a prerequisite to submitting a complete building permit application to DPER), and then he (c) attempted to submit to DPER a complete application to permit the back building as an accessory agricultural structure, and (d) DPER still declined to accept the application, *then* (e) agricultural use might be in play in a later penalty appeal. That does not mean it is a wise strategic move to decline to take the steps DPER outlined in the email Mr. Schaefer submitted (Exhibit 10), be hit with substantial penalties, and roll the dice and hope he can meet the burden of showing such penalties were erroneous. But unlike again arguing that under the facts as they *currently* exist DPER is wrong, KCC 23.32.120.A would not expressly foreclose such a claim, if the facts on the ground change.

17. This appeal, which solely involves $550, is not the forum to address such involved questions. These last three paragraphs are not findings or conclusions, but merely our attempt to provide some informal, non-binding feedback on the issue that seemed to most concern Mr. Schaeffer at last week's hearing.

DECISION:

1. Appeal of the $550 penalty issued March 19, 2015, is DENIED.

ORDERED July 13, 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.)

The following exhibits were offered and entered into the record:

Exhibit no. 1	Permitting and Environmental Review staff report to the Hearing Examiner.
Exhibit no. 2	Email from Tim Schaefer, dated April 9, 2015, with attachments.
Exhibit no. 3	DPER letter to Tim Schaefer denying civil penalty waiver request, dated April 29, 2015.
Exhibit no. 4	Email from Tim Schaefer of Appeal of Wavier, with Notice and Statement of Appeal, dated May 11, 2015.
Exhibit no. 5	Photos of subject structure, dated March 6, 2015.
Exhibit no. 6	Notice and Order, dated December 17, 2014.
Exhibit no. 7	Notice and Statement of Appeal, dated January 5, 2015.
Exhibit no. 8	Report and Decision of the Office of The Hearing Examiner, dated April 6, 2015.
Exhibit no. 9	Report and Decision of the Office of The Hearing Examiner, dated July 21, 2011.
Exhibit no. 10	Email from Michael Hepburn to Tim Schaefer, dated July 6, 2015.
Exhibit no. 11	Stop Work Order, dated November 19, 2015.

DS/jr

July 13, 2015

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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review File No. **ENFR140967**

TIM SCHAEFER AND PACIFIC STATES CONDOS (PENALTY)
Code Enforcement Penalty Appeal

I, Jonel Rabara, 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 July 13, 2015.

Jonel Rabara

Jonel Rabara
Legislative Secretary

All Parties of Record

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