February 23, 2016

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR140967**

TIM SCHAEFER
Civil Penalty Appeal

Location: 35620 SE 252nd Street, Ravensdale

Appellant: **Tim Schaefer**
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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:	Deny appeal
Examiner's Decision:	Deny appeal, but suspend penalties

EXAMINER PROCEEDINGS:

Hearing Opened:	February 11, 2016
Hearing Closed:	February 11, 2016

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

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

FINDINGS AND CONCLUSIONS:

1. The subject property contains the old schoolhouse for the historic mill town of Selleck. In 2010, the predecessor agency to the King County Department of Permitting and Environmental Review (DPER) issued a notice and order asserting conversion of that schoolhouse into habitable space without the required permits and inspections. Tim Schaefer timely appealed.

2. The appeal went to hearing, and in July 2011 examiner James O'Connor issued a decision. Exhibit 3. He found a violation, found that Mr. Schaefer had not contributed to un-permitted improvements to the schoolhouse (his father having undertaken the work in the 1990s), and found that the schoolhouse's interior posed an "unsafe condition." Mr. O'Connor concluded that the "property may not be inhabited unless and until a certificate of occupancy is obtained from King County, allowing for the property's use as a residence." He ordered that:

> The subject property shall not be used as a residence by any person until issuance of a building permit, completion and approval of all improvements required by [DPER], and issuance of a certificate of occupancy by [DPER]. If the property is currently occupied, it shall be vacated within 120 days of this decision [*i.e.*, by November 18, 2011].

3. He also ordered that no penalties could be assessed on the violation. Mr. O'Connor was a sterling examiner, and the predecessor I most try to emulate. Yet this part was almost certainly incorrect, failing to distinguish between the two components of the violation. *Construction* of the residential improvements within the schoolhouse was a past violation attributable to the a previous owner, for which Mr. Schaefer could not be penalized, even if he failed to undertake the necessary work or obtain the necessary permits. *See* KCC 23.36.030(B). Conversely, Mr. Schaefer's future *occupancy* (beyond the November 2011 deadline Mr. O'Connor set for vacating the schoolhouse) was a violation attributable to Mr. Schaefer and should have subjected him to potential penalties.

4. Regardless, what Mr. O'Connor actually decided was that no civil fines or penalties could be assessed per the schoolhouse, period and DPER did not appeal. Thus Mr. O'Connor's decision became final and unreviewable by early August 2011. While Mr. Schaefer has taken some steps toward permitting the schoolhouse as a multiplex or other residence, no permit has been applied for or issued. Yet he has continued to reside in the schoolhouse four years plus beyond the time Mr. O'Connor ordered him to vacate it.

5. The lack of a penalty incentive has complicated DPER's efforts to achieve compliance with Mr. O'Connor's order. Penalties, more accurately the prospect of avoiding penalties, is normally the next tool (post-notice and order decision) DPER uses to encourage compliance. Conversely abatement—here the County seeking a court order forcing compliance, eviction, physically entering private property and undertaking work (at a

"prevailing wage," a rate higher than a private citizen could arrange), and then billing the owner for the whole process—is a more invasive remedy and normally the last resort. And while unpaid *penalties* go to collection, incur interest charges, are a lien on the property that can put a wrench in things like a mortgage re-finance, and eventually need to be paid when the property sells, unpaid *abatement* costs are treated as a *tax* lien against the property and can result in property foreclosure. Abatement costs are, in a real sense, "costlier" than penalties.

6. Mr. Schaefer has had numerous discussions with DPER over the years about various possibilities for the schoolhouse. And DPER has held back from going the abatement route. But in 2014 Mr. Schaefer shot himself in the foot (and opened himself up to penalties) when, prior to resolving the schoolhouse violation and without bothering to ask the DPER permitting staff he was otherwise engaged with about the legality of any new buildings on the site, he began constructing a building in the back of the property. DPER served a November 2014 stop work order, which Mr. Schaffer did not appeal. Despite the stop work order having become final when the appeal window closed, he continued working on the back building, adding siding and a roof.

7. DPER followed this up with a December 2014 notice and order, which Mr. Schaefer did appeal, although his appeal was timely only in the most generous light (discussed below). We went to hearing.

8. In our April 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. We found that Mr. Schaefer was not intending to establish the primary use of the property as agricultural, given his work establishing the schoolhouse as residential, and we rejected his argument. We upheld the notice and order and denied the appeal, keeping in place deadlines for back building compliance but allowing DPER to extend deadlines.

9. About the time of that decision, DPER issued a $550 penalty for Mr. Schaefer violating the (unappealed) stop work order by continuing to construct the back building. Mr. Schaefer sought a penalty waiver and, when that failed, appealed the penalty to us. In our July 2015 decision, we re-affirmed that DPER was correctly interpreting the primary/accessory use concept, that Mr. Schaefer's primary use of the subject property was not agricultural, and that DPER had properly refused to accept an application to permit the back building as an accessory agricultural structure. We agreed that, as a practical matter, Mr. Schaefer may have made a logical choice to keep working on the back building despite DPER's stop work order (lest his initial construction be destroyed by winter weather), but that did not mean he faced no legal repercussions. Having painted himself into a corner by starting construction without obtaining the necessary approvals, Mr. Schaeffer may have made a prudent decision to walk over the wet paint, but there were consequence. We denied his penalty appeal.

10. Today's matter comes on an appeal of $8,100 in penalties for violation of DPER's December 2014 notice and order, as amended by our April 2015 decision.

11. Before analyzing the penalty, we briefly put this penalty appeal into the larger context. DPER has announced that it is proceeding to seek an injunction from superior court to force Mr. Schaefer's compliance on the schoolhouse and back building and to abate if Mr. Schaeffer does not comply. Today's decision does not impact that, nor would any appeal of today's decision. A penalty appeal is a very limited matter, an appeal of a denied penalty waiver request. KCC 23.32.100(A). The only explicit grant of authority KCC 23.32.100–.120 provides relates to penalty dollar amounts. And KCC 23.32.120(B) unequivocally states that, in the event of a conflict of chapters, the narrower KCC 23.32 "shall govern." Mr. Schaefer cannot now litigate matters he could have litigated had he appealed Mr. O'Connor's July 2011 decision or our April 2015 decision, and this process does it have forward-looking import beyond setting the parameters for collecting the $8,100.

12. Mr. Schaefer has taken some additional steps along his odyssey towards getting the schoolhouse permitted as some sort of residential structure. His vision has involved uses such as a boarding house and bed and breakfast, and now seems to center on a multiplex. Quite apart from the zoning and building engineering complexities, there is a significant water rights problem, as sketched out by his water engineer. Exhibit D of Exhibit 3. The water engineer has begun work, including starting summer and winter water use studies. Mr. Schaefer's position is that he be allowed to continue illegally occupying the schoolhouse until this is completed, and that his efforts last summer made DPER premature in issuing back building penalties, or at least that those penalties are excessive.

13. DPER's position is that such a wait is far too long, that occupancy of schoolhouse is a life/safety issue and is DPER's "primary objective" moving forward (in a separate case, outside our jurisdiction) to seek an injunction and abatement. The solution DPER offered Mr. Schaefer (prior to assessing penalties here) was that Mr. Schaefer would cease occupancy of the schoolhouse, apply for a permit to make the back building the primary residence, and apply for a permit to meet Mr. O'Connor's 2011 order on the schoolhouse by making the schoolhouse some type of accessory structure,[1] accessory to the primary use of the property as a single family residence in the back building.

14. DPER's position is the significantly more reasonable and realistic.

15. First, Mr. Schaefer's assertion that Mr. O'Connor was wrong to order that occupancy of the schoolhouse cease until an occupancy permit was obtained (arguing that Mr. O'Connor's finding that the interior of the schoolhouse was in an unsafe condition was based on flawed DPER testimony at the 2011 hearing) comes almost five years too late. The rule cited above that once the opportunity to challenge a decision passes, it becomes valid and immune to later challenge, is true even if the underlying decision was arguably

[1] Mr. O'Connor's 2011 decision also found that:

The work necessary to bring the school building into compliance with the King County Code, to the extent reasonably feasible under the present circumstances, is:
A. Remove all unapproved electrical wiring, electrical fixtures, plumbing, plumbing fixtures, and all appurtenances, installed since the 1980s, or complete their installation in an approved manner;
B. Remove from the premises all building materials, other stored items, and any junk and debris on the premises, or obtain a building permit and maintain on the premises only that equipment and those materials to be used in the completion of improvements authorized by the active permit(s).

"illegal" or "improper." *Habitat Watch v. Skagit Co.*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005); *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 932, 52 P.3d 1 (2002). The time for challenging Mr. O'Connor's decision has long since passed; the time for complying with it is now.

16. Second, even in simpler matters, Mr. Schaefer has had difficulty following deadlines and working through the regulatory process. To choose but three examples:

- In 2014, after DPER served the notice and order for the back building, Mr. Schaefer said he did not receive it (although those are sent certified mail). DPER emailed a copy, which prominently stated in all caps the date to file a notice of appeal (which can be a one sentence email). Mr. Schaefer could not meet that deadline.[2]

- The day before the appeal of the $8,100 penalty was due, Mr. Schaefer emailed us asking about filing procedures. We tried to be helpful, explaining that his appeal statement had to be received by DPER by the deadline, cautioned that filing with the examiner's office was no substitute for DPER's actual receipt, cc'd DPER on that email, and expressly stated that Mr. Schaefer merely needed to hit "reply all" to our email in order to ensure his appeal statement timely made it to DPER. Yet he failed to do that, only emailing his appeal statement to the examiner's office.

- In his appeal statement, he notes that it took him seven years to get Health Department approval for a mobile home. Exhibit I of Exhibit 2.

17. To Mr. Schaefer, "getting even a simple mobile home permit" was "like trying to pass an act of Congress." Exhibit I of Exhibit 2. His statement that "[h]ow much more [difficult] a 5-plex permit" would be, *id.*, is not only true, but significantly understates the difference. It is highly unlikely he will ever complete the legal conversion of the schoolhouse to a multiplex; hopefully we are wrong about that, but in any event completion would be years down the road. We agree with the DPER official's assessment at hearing that she does "not see a light at the end of the tunnel" for Mr. Schaefer permitting the schoolhouse as a multiplex.

18. The position that Mr. Schaefer be allowed to remain in the schoolhouse until he can get the back building permitted as a residence is not quite so out there, but it is still unreasonable. A single family residence is typically engineered to meet code, receives health department approval, and has building/engineering plans approved such that the builder is allowed to legally begin construction. Often, the structure is substantially completed per code, but then something happens (such an economic pinch) such that the building does not receive its final occupancy certificate and the permit expires and is cancelled. In that scenario, an owner may need to apply for a "new" permit and undergo additional analysis, but there is no real reason to think the structure (perhaps with some minor modifications to incorporate any intervening code change) cannot be quickly completed.

[2] For reasons explained in our February 2015 order, we did not dismiss his appeal as untimely.

19. Conversely, Mr. Schaefer began constructing the back building as a chicken coop, and then he morphed it into something else. This scenario is the opposite end of the spectrum from the expired permit scenario in terms of complexity, timing, and risk of non-completion. Mr. Schaefer's track record on timely permit completion is not cause for optimism. DPER is correct to require the schoolhouse be vacated in short order. And again, Mr. O'Connor's decision was clear: cease occupancy of the schoolhouse *until* a certificate of occupancy was received.

20. If we wore a robe, carried and a gavel, and applied the standard of review we believe a trial court would, we would simply uphold DPER's penalty, dismiss Mr. Schaefer's appeal, and be done. But that is not our seat on the bus, and we will toss Mr. Schaefer a lifeline.

21. First, although the deadlines and requirements DPER set last summer for Mr. Schaefer to meet to avoid DPER issuing penalties seem clear at least in hindsight, the PAO allowed at hearing that there might have been some "confusion" at the time. Although it is clear now what Mr. Schaefer needs to do to (cease schoolhouse occupancy and apply to permit the back building as a primary residence and the schoolhouse as an accessory structure) there is at least a colorable argument that this was not crystal clear at the time DPER made its demand and then issued the penalty.

22. Second, Mr. Schaefer claimed at hearing that had DPER told him last summer (and prior to issuing penalties) that he needed to comply within a few weeks or be hit with an $8,100 fine, he would have cried uncle and come into compliance. We will give him the chance to put his money where his mouth is.

23. We conclude that the public will be better served if Mr. Schaefer devotes his resources, energies, and his $8,100 to finding an interim rental home for his family to live until he can obtain permits to legalize the back building as a residence and to bring the schoolhouse into compliance. We will thus suspend the penalties and provide Mr. Schaefer with the same 120 days Mr. O'Connor provided back in 2011 to cease occupancy of the schoolhouse. We ask DPER to re-send Mr. Schaefer an updated compliance schedule and set a new deadline(s). If Mr. Schaefer fails to comply with that amended schedule, DPER may reinstitute the $8,100 penalty.

24. We recognize the hardship moving creates for Mr. Schaefer and his family, especially in light of his daughter's health condition. But Mr. Schaefer has been living on borrowed time for at least the last four plus years (Mr. O'Connor having ordered that occupancy cease by November 2011) and the violations on the subject property stretch back years longer than that. Plus DPER is moving ahead, via a separate process, with obtaining an injunction and order of abatement, and nothing we say here today will change that.[3] In

[3] Today's decision in no way stymies DPER from separately enforcing its notice and order/2011 O'Connor decision related to the schoolhouse, and/or its notice and order/our April 2015 decision related to the back building. The last examiner order to cease occupancy of the schoolhouse within 120 days has been ignored for four plus years. One would hope that the $8,100 would now incentivize compliance, but nothing here prevents DPER from proceeding to put a backup plan in place. So long as the date DPER requests for eviction/abatement is at least one day after the June 22, 2016, date set below (and it is difficult to see how DPER would be in position to evict/abate before then anyway), there is no conflict.

addition, this decision is not inconsistent with Mr. Schaefer or a future owner someday turning the schoolhouse into something grander than an accessory structure.

25. We close with a word about finality and appealability. This is our final decision in this matter. Below the signature line, we include the standard appeal language; either party is free to seek superior court review now. But, especially from Mr. Schaefer's perspective, a current appeal might be premature; per this order Mr. Schaefer does not, as of today, owe penalties, and if he complies he may never owe penalties. If he fails either to cease occupancy or to meet DPER's amended compliance deadlines, DPER may reinstitute these penalties. That might be the more appropriate point to appeal both today's decision and DPER's reinstituted penalties.

26. In such an unfortunate situation, the appeal would not be back to us but to superior court. DPER issued penalties, Mr. Schaeffer unsuccessfully sought a penalty waiver, and he appealed that denied waiver to us. We are not redoing that process. If, down the road, DPER re-instates these penalties, in that penalty document DPER should provide Mr. Schaefer the appropriate language for how/when he can take this decision and that reinstituted penalty to superior court.

27. Unlike a penalty appeal the examiner hears, an appeal to superior court involves significantly more than simply emailing something to the appropriate officials by a given date, and even that proved a challenge in these appeals. And while we typically review agency decisions *de novo* (meaning we do not accord the agency deference), a court reviewing a DPER decision reinstituting penalties would likely accord DPER some deference.[4] And a court reviewing our decision typically "must give substantial deference to both the legal and factual determinations of a hearing examiner as the local authority with expertise in land use regulation." *Durland v. San Juan County*, 174 Wn. App. 1, 12, 298 P.3d 757 (2013). Today's decision is not the one Mr. Schaeffer was hoping for, and we do not discount the disruption it will create. But it would behoove him to realistically assess his chances and the consequences for his family before moving forward.

DECISION:

1. Mr. Schaefer's appeal is denied. However, the $8,100 penalty is *suspended* and is not to be reinstated so long as (a) Mr. Schaefer ceases occupancy of the schoolhouse by **June 22, 2016**, and (b) follows the amended compliance deadlines DPER hereafter sets.

2. If Mr. Schaefer fails to comply, DPER may reinstate the penalties. If DPER reinstates the $8,100, that penalty document shall provide the appropriate right-to-appeal language.

ORDERED February 23, 2016.

David Spohr
Hearing Examiner

[4] As we noted above, if we were reviewing DPER's penalty assessment here under the standard we believe a trial court would apply, we would have simply denied his appeal.

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 The Examiner issues a land use decision as three days after the Examiner mails the written document.)

MINUTES OF THE FEBRUARY 11, 2016, HEARING ON THE APPEAL OF TIM SCHAEFER, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. ENFR140967.

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Tim Schaefer, Holly Sawin, Elizabeth Deraitus, and Michael Hepburn.

The following exhibits were offered and entered into the record at the hearing:

Exhibit no. 1	DPER Staff Report
Exhibit no. 2	Hearing Examiner's Report and Decision dated April 6, 2015
Exhibit no. 3	Notice of Civil Penalty Appeal email dated November 19, 2015
Exhibit no. 4	Email from Michael Hepburn to Tim Schaefer dated July 8, 2015
Exhibit no. 5	Civil Penalty Waiver Denial Letter, Waiver and Appeal Forms dated October 30, 2016
Exhibit no. 6	Email from Fereshteh Dehkordi to Mr. Schaefer dated October 14, 2014
Exhibit no. 7	Email from Elizabeth Deraitus to Mr. Schaefer dated October 15, 2015

The record was left open at hearing to allow DPER to submit the following exhibit from the file:

Exhibit no. 8	Application for Health Department Approval of a Building permit denied August 4, 2014

DS/ed

February 23, 2016

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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR140967**

TIM SCHAEFER
Civil Penalty 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.

DATED February 23, 2016.

Elizabeth Dang
Legislative Secretary

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