

January 4, 2018

**OFFICE OF THE HEARING EXAMINER  
KING COUNTY, WASHINGTON**

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**REPORT AND DECISION**

**SUBJECT:** Department of Permitting and Environmental Review file no. **ENFR161049**

**PHILLIP JAMES MCNAMEE**  
Civil Penalty Waiver Appeal

**Location:** 19411 NE 165th Street, Woodinville

**Appellant:** Phillip James McNamee  
*represented by* **John Ely**  
18530 156th Avenue NE Suite 200  
Woodinville, WA 98072  
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**King County:** Department of Permitting and Environmental Review  
*represented by* **LaDonna Whalen**  
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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 in part, grant the appeal and part

**EXAMINER PROCEEDINGS:**

Hearing Opened:	December 19, 2017
Hearing Closed:	December 19, 2017

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.

After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, the examiner hereby makes the following findings, conclusions, and decision.

## FINDINGS AND CONCLUSIONS:

### Background

1. In October 2016, Phillip James McNamee was injured in a serious car accident, requiring painful fusion surgery to repair his broken back. Ex. A-1c. In December, the Department of Permitting and Environmental Review (DPER) received a complaint involving vehicles and vehicle parts on Mr. McNamee's property, and DPER sent Mr. McNamee a letter. Mr. McNamee and the assigned code enforcement officer spoke in January 2017.
2. In February, Mr. McNamee emailed, explaining that his rehab of his fractured back had gone astray, limiting his movement and ability to handle weight and forcing him again into physical therapy. Ex. D-8. He noted that he had repaired (and removed) a hauling truck and removed an inoperable car. He described how he had been diagnosed with kidney cancer, had surgery in early January, and was preparing for additional surgery in March. He closed by stating that he "will not be addressing anything else for a few months."
3. The officer emailed back the same day, noting that the violations remained, but expressing understanding of Mr. McNamee's limitations. Ex. D-8. She wrote that the best she could offer was a Voluntary Compliance Agreement (VCA), the vehicle by which they could negotiate an extended compliance deadline. She closed by asking him to let her know if he wanted a VCA. Mr. McNamee did not respond, although at hearing he explained why (discussed below).
4. In March 2017, DPER served an order ("Order"), Exhibit D-7, that:
  - found Mr. McNamee had an "accumulation of inoperable vehicles and vehicle parts on external premises" and "[p]arking/storage of vehicles on non-impervious (unimproved) surfaces";
  - required Mr. McNamee "to remove inoperable vehicles and vehicle parts from the premises or store these materials within a fully enclosed building [and] cease parking/storage of vehicles on non-impervious surfaces by June 14, 2017";
  - set forth the potential penalties for noncompliance, including \$65 per day for the first 30 days, doubling to \$130 for each day afterwards; and
  - pointed to the code section that requires the person responsible for code compliance to notify DPER of any actions taken to achieve compliance.

Mr. McNamee did not appeal that Order, nor did he contact DPER prior to DPER inspecting the property again in July, although at hearing he explained why (discussed below).

5. When DPER inspected the property in July, it concluded that Mr. McNamee was not in compliance. DPER fined him a month’s worth of penalties. It then re-inspected in August, concluded that McNamee was still not in compliance, and fined him a second month’s worth of penalties (at double the daily rate as for the first month). Mr. McNamee requested a penalty waiver, which DPER denied. Exs. D-9, D-2.

### Analysis

6. Mr. McNamee timely appealed the waiver denial to us. Ex. D-3. 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. In addition, in “an appeal of the assessment of civil penalties, the 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 went to hearing on December 19, 2017.
7. Mr. McNamee questions why DPER issued the March Order, given his February email. That would have been a legitimate ground to assert in appealing the Order. Several other potential arguments come to mind as well: that a previous enforcement officer had (in a prior case) found compliance; that there were no violations; and that given his physical condition and limitations the Order was either premature or the June compliance deadline was unreasonable. However, once the window for appealing the Order shut in mid-April, the Order—including the existence of an accumulation of inoperable vehicles and vehicle parts on external premises and storing vehicles on non-impervious surfaces and the timeline for compliance—became final and unchallengeable.
8. At hearing, Mr. McNamee noted that, given his medical condition, he did not check his PO Box and receive the Order until approximately 10 days after the April 17 appeal deadline ran out. Our courts, especially in the land use context, seem eager to find finality and reticent to allow equitable tolling. But even if some sort of tolling would have been cognizable, that only would have pushed out his deadline for challenging that Order until May. The Order was definitely unchallengeable by the point in July that DPER began to assess penalties based on that Order.
9. Thus our role today is somewhat limited, with no authority to review the Order’s findings, requirements, or other items that could have been challenged during the Order’s appeal period. KCC 23.32.120.A. That means our baseline is that, as of March, Mr. McNamee (1) had some inoperable vehicles and vehicle parts stored outside, (2) was parking or storing some vehicles (whether operable or not) on non-impervious surfaces, (3) had a duty to get those inoperable vehicles and vehicle parts off the property or within a building by mid-June, (4) had a duty to remove from the premises or relocate to a non-impervious surface operable vehicles, also by mid-June, and (5) a duty to notify DPER of his compliance efforts. From that baseline we then determine whether Mr. McNamee had remedied the violations as of July or August (i.e., penalties “assessed after achieving compliance”) or whether the \$6,300 in penalties were “otherwise erroneous or excessive under the circumstances.” KCC 23.32.110.
10. As to whether the property was in compliance as of the July and/or August penalty assessments, Mr. McNamee’s basic contention is that as of March, DPER was incorrect

in finding violations. Yet, as discussed above, once the appeal window for the March Order shut, those violations became unchallengeable. The “facts” for purposes of our analysis is thus that there was “an accumulation of inoperable vehicles and vehicle parts” and storage of “vehicles on non-impervious” surfaces on Mr. McNamee’s property.

11. There is no real evidence that between the time of the March Order and July/August, he removed (or stored inside) multiple vehicle parts or inoperable vehicles, fixed up and made operable multiple inoperable vehicles, or removed (or moved to impervious surfaces) multiple operable vehicles. In fact, he candidly admitted—and we found Mr. McNamee credible throughout—that he did not do much between March and the penalties being issued. Even beyond the finality angle (i.e. unchallengeable facts established by the March Order), the property was not in compliance at the time penalties were assessed. For example, Exhibit D-4 at 003 shows a pile of tires and other equipment stored outside. Any way we look at it, penalties were not assessed after achieving compliance.
12. Turning to whether the penalties were otherwise erroneous and/or excessive under the circumstances, DPER has likely overstated the *extent* of inoperable vehicles and vehicle parts stored outside, and of vehicles (operable or not) stored on non-impervious surfaces. For example, one of the trucks DPER cited was that of a contractor visiting the site to bid on a concrete slab to park some of Mr. McNamee’s vehicles. The tractor-trailer bed was on an impervious surface, at least by August. Ex. D-5 at 001. And a 2014 photo shows the front driveway area is impervious surface. Ex. A-3.
13. In addition, while Mr. McNamee in some sense made his own bed by not responding to DPER’s offered alternative compliance route (a VCA instead of a formal Order), by assuming that his unilateral statement that he would not be addressing other items for several months would be sufficient, and by not advising DPER of any corrective actions he was taking, there are still some pretty strong extenuating circumstances here.
  - With his serious car accident, requiring painful fusion surgery to repair his broken back, pain medication, and prolonged rehabilitation, along with kidney cancer and cancer surgery, Mr. McNamee was physically limited. He noted that he is in constant enough pain that if he still had a job, he would not be able to go to work.
  - In addition to his physical limitations, his doctor explained that a history of chemotherapy efforts has left Mr. McNamee with some “chemo brain,” which can make his thinking “fuzzy.” Ex. A-1c.
  - Mr. McNamee’s statements that, given the above, he could not “emotionally process” DPER’s requirements, has a “hard time” addressing items, and was “done” (emotionally) are understandable, given all life was throwing at him.
14. For the above reasons, we find the penalty amount excessive under the circumstances. There is no magic mathematical formula for how we reduce a penalty we find excessive. We find an elimination of \$4,000 of the \$6,300 in penalties appropriate.

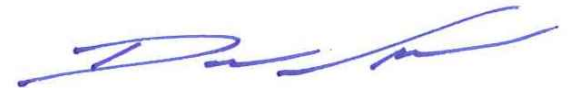
Forward-looking Thoughts

15. As described above, our jurisdiction in a penalty appeal is limited to adjusting or eliminating the dollar penalty.<sup>1</sup> Thus these four paragraphs are merely food for thought. They do not constitute any formal determination. If not helpful to resolve the ongoing dispute, they may be ignored.
16. Our decision today only relates to the dollar amount. It does not wrap up the case. It simply ends this phase. Code enforcement now closes out its case and the file shifts to DPER’s abatement manager, Beth Deraitus ([elizabeth.deraitus@kingcounty.gov](mailto:elizabeth.deraitus@kingcounty.gov) or (206) 477-0292). Ms. Deraitus will contact him about bringing the property into compliance (including, we assume, some sort of site visit to go over specific vehicles and parts). DPER noted at hearing that Ms. Deraitus has authority to reduce penalties if compliance is achieved.
17. At hearing, Mr. McNamee mentioned his efforts to vegetatively screen his property. That is helpful. However, the code does not exempt outdoor storage of inoperable vehicles or vehicle parts simply because they cannot be seen. KCC 23.10.040.A. Screening might have kept (or might in the future keep) a complaint from being filed, since someone who cannot see the vehicles or vehicle parts would presumably be less likely to complain than one who could. This might have kept (or in the future keep) DPER from being roped in. But once DPER receives a complaint, invisibility is not a get-out-of-jail-free card.
18. Finally we offer a word of caution in regard to trying to resolve the dispute by adding gravel to make the parking spaces for operable vehicles impervious. If the cumulative amount of new impervious added since January 1, 2005, exceeds 2,000 square feet—and the addition of a more compacted surface counts as a new impervious surface—that triggers the need for a grading permit. KCC 16.82.051.C.2; KCC 9.04.020.KK. Depending on whether (and how intensive) drainage review is required as part of a grading permit, a grading can permit can be expensive. So pursuing that as a “cure” could wind up being significantly more expensive than simply removing vehicles from the premises.

## DECISION:

1. Mr. McNamee’s appeal is denied in part, and granted in part.
2. The amended amount Mr. McNamee owes DPER on the \$6,300 penalty is \$2,000, subject to possible later downward adjustment by DPER if compliance is achieved.

ORDERED January 4, 2018.



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David Spohr  
Hearing Examiner

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<sup>1</sup> Our typical jurisdiction is fairly broad, and normally includes the authority to, for example, condition, modify, or restrict a government action. *See, e.g.*, KCC 20.22.030.C. However, in a conflict between our broader general authorities versus our narrower penalty authority, the narrower controls. KCC 23.32.120.B.

## NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County’s final decision for this type of case. This decision shall be final and conclusive unless proceedings for review of the decision are timely and properly commenced in superior court. Appeals are governed by the Land Use Petition Act, Chapter 36.70C RCW.

### MINUTES OF THE DECEMBER 19, 2017, HEARING IN THE APPEAL OF PHILLIP JAMES MCNAMEE, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. ENFR161049

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were LaDonna Whalen, Jeri Breazeal, John Ely, and Phillip James McNamee.

The following exhibits were offered and entered into the record:

- |                 |  |
|-----------------|--|
| Exhibit no. D-1 | Department of Permitting and Environmental Review staff report to the Hearing Examiner for file no. ENFR161049   |
| Exhibit no. D-2 | Letter from DPER to John Ely with civil penalty reduction request denial, dated September 25, 2017   |
| Exhibit no. D-3 | Notice and statement of appeal, received October 12, 2017  |
| Exhibit no. D-4 | Photographs of subject property, dated July 3, 2017  |
| Exhibit no. D-5 | Photographs of subject property, dated August 15, 2017   |
| Exhibit no. D-6 | Aerial photographs of subject property, dated May 4, 2017, 2015, and 2013  |
| Exhibit no. D-7 | Notice and order, issued March 24, 2017  |
| Exhibit no. D-8 | Email from DPER to Phillip McNamee with voluntary compliance agreement option, dated February 13, 2017   |
| Exhibit no. D-9 | Civil penalty waiver request, dated July 28, 2017  |
| Exhibit no. A-1 | Pre-hearing statement, dated December 5, 2017  |
|                 | <ul style="list-style-type: none"> <li>a. Email from Phillip McNamee to DPER, dated February 13, 2017</li> <li>b. Email from DPER to Phillip McNamee with voluntary compliance agreement option, dated February 13, 2017</li> <li>c. Letter from Dr. Mukund Sargur with Phillip McNamee’s health summary, dated July 21, 2017</li> </ul> |
| Exhibit no. A-2 | Rebuttal pre-hearing statement, dated December 13, 2017  |
|                 | <ul style="list-style-type: none"> <li>a. Photographs of subject property</li> <li>b. Photographs of neighboring properties</li> </ul>   |
| Exhibit no. A-3 | Photograph of subject property, dated October 22, 2014   |

DS/ed

January 4, 2018

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**CERTIFICATE OF SERVICE**

SUBJECT: Department of Permitting and Environmental Review file no. **ENFR161049**

**PHILLIP JAMES MCNAMEE**  
Civil Penalty Waiver Appeal

I, Elizabeth Dop, 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/interested persons and 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/interested persons to addresses on record.

DATED January 4, 2018.



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Elizabeth Dop  
Legislative Secretary

**Breazeal, Jeri**

Department of Permitting and Environmental Review

**Deraitus, Elizabeth**

Department of Permitting and Environmental Review

**Ely, John**

Bates & Ely PLLC

Hardcopy

**Lux, Sheryl**

Department of Permitting and Environmental Review

**McNamee, Phillip James**

Hardcopy

**Whalen, LaDonna**

Department of Permitting and Environmental Review

**Williams, Toya**

Department of Permitting and Environmental Review