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THE HEARING EXAMINER OF THE CITY OF KIRKLAND

IN RE:

Case No. COM20-00604

Dean Bryant; EIB Group LLC

Hearing on Notice of Violation

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL DECISION.

Overview

Dean Bryant an EIB Group LLC are found to have violated KMC 15.52.090 by illicit discharge of sediment contaminated waters into the City of Kirkland municipal storm system. However, their violations are not found to be willful or knowing as determined by City staff. For this reason, the total fines assessed for the violation are reduced from the \$2,150.48 recommended by staff for each party to \$1,400.48 for each party. Dean Bryant an EIB Group LLC shall each pay \$1,400.48 to the City of Kirkland within thirty calendar days of the issuance of this decision.

Exhibits

The August 24, 2021 staff report with its attachments was admitted as Ex. No. 1 during the hearing.

1 **Findings of Fact**

2 1. Notice of Civil Violation. Dean Bryant and EIB Group LLC were cited with a
3 Notice of Civil Violation (NOCV) on August 24, 2021. They were cited with violating
4 KMC 15.52.090 for allegedly discharging sediment into Kirkland’s storm drainage
5 system from a construction site located at 13019 66th Pl NE, Kirkland. Mr. Bryant is
6 the owner of the construction site and EIB Group LLC is a contractor for the site. The
7 NOCV seeks a fine of \$2000 against each party plus cost recovery of \$150.48 against
8 each party.

9 2. EIB Control Over Erosion Control. EIB Group LLC, as a contractor for the
10 property owner, had control over erosion control at the subject project site. Mr. Merino,
11 who works for EIB, testified that when he found erosion control deficiencies at the
12 project site, he endeavored to remedy them. He noted that he repaired the silt fencing
13 and covered the project site with plastic to prevent runoff.

14 3. Illicit Discharge. On October 13, 2021, water polluted with sediment was
15 discharged from a construction site located at 13019 66th Pl NE, Kirkland. This fact is
16 uncontested by the alleged responsible parties and is supported by the testimony of City
17 staff as well as photographs taken on the day of the illicit discharge. See Att. 3 to staff
18 report.

19 4. No Knowing and Willful Discharge. The alleged illicit discharge was not
20 knowing or willful.

21 The City’s Surface Water Enforcement Matrix designates the alleged discharge as
22 willful or knowing because compliance with the City’s illicit discharge standards was
23 made a condition of the construction permit for the project site. However, the alleged
24 responsible parties took the measures required by code to prevent illicit discharges, i.e.
25 compliance with best management practices, most notably installation of silt fencing to
26 prevent sediment run off. It appears that the alleged illicit discharge was caused by
27 damage to that fencing. However, the damage was likely caused by falling tree limbs
28 and was not due to any willful or wanton disregard by the alleged responsible parties.
29 City staff testified that many contractors know to double the layers of silt fencing to
30 avoid the type of breach that occurred. While this may be a sound construction
practice, the fact that the alleged responsible parties may not have known to take this
added measure does not make their violation of illicit discharge standards knowing or
willful.

There is no evidence that the alleged responsible parties had any knowledge of an illicit
discharge they could have reasonably prevented. There is no evidence that the alleged
responsible parties knowingly violated any development standards designed to prevent

1 illicit discharges, such as silt fencing best management practices. For these reasons, the
2 illicit discharge is not found to be willful or knowing.

3 5. Abatement Cost. The cost recovery for City abatement of the illicit discharge
4 totals \$300.96. As documented in Attachment 10 to the staff report, the labor and
5 equipment costs associated with the City's spill response total \$300.96. This fact is
6 uncontested and is consistent with the costs associated with a moderate spill response.

7 6. Hearing. A virtual hearing on the NOCV was held on 9:30 am, October 7, 2021
8 by the Zoom meeting application, Meeting ID 964 4521 2403.

9 **Conclusions of Law**

10 1. Jurisdiction. KMC 1.12.050 provides that the hearing examiner shall conduct a
11 hearing and issue a final decision on the validity of Notices of Violation.

12 2. Alleged Code Violations. The Notice of Civil Violation asserts a violation of
13 KMC 15.52.090, which is quoted in pertinent part below and applied via a
14 corresponding conclusion of law.

15 **KMC 15.52.090 Illicit discharges and Connections:** (a) *Prohibition of Illicit*
16 *Discharges. No person shall throw, drain, or otherwise discharge, cause or allow*
17 *others under its control to throw, drain or otherwise discharge into the municipal storm*
18 *drain system and/or surface and ground waters any materials other than storm water.*
19 *Illicit discharges are prohibited and constitute a violation of this chapter. Examples of*
20 *prohibited contaminants include, but are not limited to, the following:*

21 ...

22 (26) *Silt, sediment, concrete, cement or gravel.*

23 ...

24 3. Violation Sustained.: As determined in Finding of Fact No. 2, on October 13,
25 2020, Dean Bryant and EIB Construction were responsible for the discharge of
26 sediment laden waters into Kirkland's municipal stormwater drainage system in
27 violation of KMC 15.52.090(3) as quoted above.

28 4. Turbidity Standards. At the hearing the alleged responsible parties asserted that
29 minimum turbidity requirements applied to their alleged illicit discharge. The alleged
30 illicit discharges of this case are not subject to any minimum water quality standards.
The City did not have to measure or establish the turbidity levels of the alleged illicit
discharges.

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The KMC does not set any minimum turbidity levels for illicit discharges of sediment. KMC 15.52.090 sets no such explicit minimum levels of turbidity. KMC 15.52.110 adopts water quality standards, which includes maximum turbidity levels. However, these water quality standards are not linked to what qualifies as illicit discharges under KMC 15.52.090. They serve as separate surface water management violations.

The intended application of KMC 15.52.110 turbidity standards is revealed in the details of the turbidity standards. KMC 15.52.110 adopts Chapter 173-201A by reference. Turbidity levels are specifically set by WAC 173-201A-200. Those turbidity standards are based upon increases in background levels of turbidity for specific types of receiving aquatic habitat, such as char spawning habitat and core summer salmonid habitat. The turbidity levels are not based upon the turbidity level of the discharge itself. As demonstrated in many prior illicit discharge cases, a substantial portion if not all of Kirkland’s stormwater system discharges into Lake Washington. If illicit discharge levels were based upon increases in turbidity to Lake Washington, it’s unlikely that any discharge of sediment laden waters would ever exceed maximum turbidity levels. Such a result would be contrary to the requirements of the City’s Western Washington Phase II Municipal Stormwater Permit, which requires the City to prohibit sediment laden discharges into its stormwater system.

5. Responsible Parties. EIB Group LLC and Dean Bryant were properly named as the responsible parties in the subject Notice of Violation.

At hearing Mr. Merino, on behalf of EIB Group LLC, argued that it and the owner should not be held responsible for the illicit discharge because they had no knowledge of the best management practices required and implemented to prevent illicit discharges. Mr. Merino noted that erosion control was not within his scope of work as the contractor and that the owner of the property could not have had any knowledge or understood the details of the erosion control measures prepared by the project engineer.

KMC 1.12.040(a)(1) authorizes the City to issue notices of civil violation “to the person responsible” for the violation. KMC 1.12.020(1)(j) defines the “person responsible” to include the property owner and any contractor who has control of the property. It is uncontested that Mr. Bryant is the owner of the property. Further, as determined in Finding of Fact No. 2, EIB Group LLC had control over erosion control measures at the project site. It should also be noted that if EIB Group LLC were not held responsible for the illicit discharge that Mr. Bryant would then have to pay for the entirety of EIB’s share of the fines recommended by staff.

1 6. Fines Not Properly Calculated. The \$2,150.48 in fines assessed against each
2 party were not properly calculated in the NOCV. As documented in att. 4 to the staff
3 report, City staff assigned two points to the surface water enforcement matrix for a
4 knowing and willful violation. As determined in Finding of Fact No. 4, the discharge
5 was not knowing and willful. Consequently, the total matrix score for the violation is 6
6 as opposed to 8. The matrix fine for a score of 6 is \$2,500 as opposed to \$4,000 for a
7 score of 8. As determined in Finding of Fact No. 5, the total amount for cost recovery is
8 \$300.96. Splitting equally the violation fine and cost recovery amount between the
9 property owner and the contractor, the total amount owed by each for the illicit
10 discharge is \$1,400.48.

11 7. Monetary Penalty. In its staff report, the City has asked that a fine of \$100 per
12 day be assessed for each day that the responsible parties have failed to timely pay the
13 fines imposed by this decision. This amounts to a late payment fee of \$3,000 per month
14 for a \$1,400.48 fine. Such a penalty may be in violation of the eight amendment to the
15 US Constitution, which prohibits excessive fines. If the responsible parties fail to pay
16 their fines within 30 days as required by this decision, the City will have an easy
17 collection action against them. Further, since the fine amount is less than \$10,000, the
18 City should also be able to get reimbursed for its attorney fees should it have to take its
19 collection action to court as authorized by RCW 4.84.250 et seq. For these reasons, the
20 responsible parties have plenty of incentive to pay their fines. There is no reasonable or
21 constitutional basis for assessing \$100 daily late payment fees for failure to timely pay
22 the fines.

23 **Decision**

24 EIB Group LLC and Dean Bryant shall each pay the City of Kirkland \$1,400.48 in fines
25 within 30 calendar days of this decision for its illicit discharge to the City's stormwater
26 system as outlined above.

27 ORDERED this 21st day of October 2021.

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29 Phil A. Olbrechts
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City of Kirkland Hearing Examiner

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Appeal

An appeal of this Decision must be filed with superior court within twenty-one calendar days from issuance as required by the Land Use Petition Act, Chapter 36.70C RCW.