THE HEARING EXAMINER OF THE CITY OF KIRKLAND

IN RE: Dean Bryant; EIB Group LLC Hearing on Notice of Violation	Case No. COM20-00604 FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION.

Overview

RD Homes LLC and Quick and Easy Concrete are found to have violated KMC 15.52.09 by Quick and Easyôs illicit discharge of silt, sediment and petroleum products into the Cityôs municipal stormwater system. RD Homes shall pay $833.33 in fines and $702.55 in cost recovery. Quick and Easy Concrete shall pay $702.56 in cost recovery. Mr. Huang is not assessed any penalty or cost recovery because he is found to be an innocent party in this violation. Fines and cost recovery are due by October 17, 2022.

The Cityôs Revised Notice of Civil Violation (NOCV) is largely sustained except for a minor modification to the allocation of fines and cost recovery. The NOCV fines and cost recovery for Mr. Huang are waived and cost recovery is increased for the two remaining parties from 33% to 50% each.

Three factors are at play in evaluating the proper allocation of the assessments. First, KMC 1.12.060d provides that cost recovery can be billed to the responsible party ñ*and/or*ò the owner. The responsible party in this case includes both RD Homes

and Quick and Easy Concrete actually committed the illicit discharge violation via its driver washing its truck at the violation site.

5. Fines Properly Calculated. The fines assessed against each party were properly calculated in the NOCV as detailed in Ex. 1, att. 6 and 7. The fine matrix for illicit discharges was properly applied as required by KMC 1.12.200 and the accuracy of that application was uncontested.

6. Adjustment of NOCV fines/costs Authorized/Justified. Adjustment of the fines and costs properly imposed by the NOCV is both authorized and equitable.

KMC 1.12.050(d)(4) authorizes the Examiner to modify fines by reducing them to zero or increasing them up to 100% from the "monetary penalty schedule." KMC 1.12.050(d)(4) lists a number of nonexclusive equitable factors that can be considered in adjusting fines, including "*[a]ny other relevant factor*s." The "overview" section of this Decision identifies the factors justifying waiving the NOCV fine assessed against the homeowner due to his status as an innocent party.

KMC 1.12.200g provides that cost recovery can be imposed against "any" responsible party. The KMC does not provide any guidance on how to allocate costs amongst more than one responsible party, except to note that the owner can be held jointly and severally liable with the other parties. For the reasons identified in the "overview" section of this Decision, abatement costs are divided equally between RD Homes and Quick and Easy Concrete.

7. $100 Daily Penalty Cruel and Unusual Punishment. City staff request a daily fine of $100 for failure to pay required fines and cost recovery within the deadlines set by this Decision. That request exceeds the bounds of constitutional cruel and unusual punishment. Failure to pay the fine imposed by this Decision shall subject RD Homes LLC to a daily penalty of $100 per day after expiration of the deadline up to a maximum of doubling of the fine, plus 12% annual interest thereafter until the fine is paid. Failure to pay the cost recovery shall bear 12% annual interest after expiration of the payment deadline until the cost recovery is paid.

The NOCV advises that failure to take corrective action by the date set by the hearing examiner shall be subject to a daily fine of $100. The only corrective action sought in the NOCV is payment of fines and cost recovery. Section VD of the staff report, Ex. 1, requests that the $100 daily fine apply to failure to pay fines and cost recovery.

The NOCV identifies that the $100 daily fine is authorized by KMC 1.12.040. The only reference to a $100 daily fine in KMC 1.12.040 is KMC 1.12.040e1A, which authorizes a $100 "penalty" for first time violations. The State Supreme Court has ruled that

excessive civil fines can qualify as cruel and unusual punishment if they qualify as punitive rather than remedial. *City of Seattle v. Long*, 493 P.3d 94 (Wash. 2021). It's unclear at what point fines become excessive under applicable case law. However, the daily fines requested by the City total $36,500 per year for late payment of fines and cost recovery totaling less than $2,000 per party. Reasonable minds would not disagree that such penalties are excessive and unreasonable.

In the absence of any direct guidance on appropriate limits for setting maximum daily fines, other adopted laws that suggest similar considerations of reasonableness are appropriately applied. In this regard, KMC 1.12.050 authorizes the Examiner to double fines assessed by the NOCV based upon equitable considerations. Consequently, the daily fines for nonpayment of cost recovery shall be capped at double the original fine, specifically an additional $833.33 for RD Homes. Cost recovery is based upon making the City whole again. In this regard, there is no compelling need to make the daily fines any greater than maximum post-judgment interest, which is generally 12% per RCW 4.56.110 and 19.52.020.

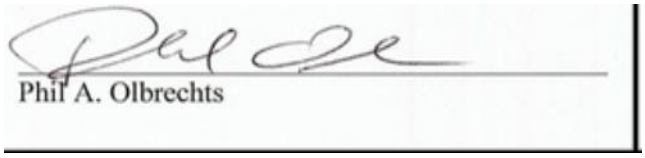
Decision

For the reasons outlined in the Conclusions of Law above, the parties subject to the NOCV shall pay fines and cost recovery as follows:

1. RD Homes LLC shall pay $833.34 in fines and $702.55 in cost recovery.
2. Quick and Easy Concrete shall pay $702.56 in cost recovery.
3. Huang Lifei is assessed no fines or cost recovery.

The fines and cost recovery shall be paid by October 17, 2022. Failure to pay the fine by the October 17 deadline shall result in a daily penalty of $100 per day up to a maximum of an additional $833.34 with 12% annual interest thereafter. Failure to pay cost recovery by the October 17 deadline shall also result in 12% annual interest.

ORDERED this 19th day of September 2022.



City of Kirkland Hearing Examiner

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.