August 10, 2012

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REPORT AND DECISION

SUBJECT: Development and Environmental Services File No. **E09G0106**

CREST DEVELOPMENT LLC
Civil Penalty Appeal

Location: Approximately 29517 176th Avenue SE

Appellant: Crest Development, LLC
represented by **Earl Soushek**
22630 SE 268th Street
Maple Valley, WA 98038
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King County: Department of Development and Environmental Services
represented by **Holly Sawin**
900 Oakesdale Avenue SW
Renton, WA 98057
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny Appeal
Department's Final Recommendation:	Deny Appeal
Examiner's Decision:	Grant in Part, Deny in Part

EXAMINER PROCEEDINGS:

Hearing Opened:	July 24, 2012
Hearing Closed:	July 31, 2012

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.

Having reviewed the record in this matter, the Examiner now makes and enters the following:

BACKGROUND:

1. Crest Development, LLC (Crest) owns the subject property, located at 29517 176th Avenue SE in unincorporated King County. On April 5, 2011, the King County Department of Development and Environmental Services (DDES) issued a notice and order (Notice) to Crest.

2. The Notice alleged violations of the King County code for the operation of a construction and trade business (contractor's storage yard), and the accumulation of assorted rubbish, salvage, and debris (debris) on the subject property.

3. Crest timely appealed the Notice. Following a hearing, this office issued a September 2011 Report and Decision (Decision), denying the appeal, subject to certain conditions and deadlines. Discussed in greater detail below, our Decision required Crest to complete certain tasks before the end of 2011. The Decision was not appealed, and thus has become final and unreviewable, the standard against which Crest's penalty appeal is now judged.

4. Code Enforcement visited the property on February 12, 2012, concluded that Crest had failed to meet the Decision's deadlines, and at some point issued a penalty invoice (Invoice) for $17,550. Of this, $9,450 was for the contractor's storage yard and $8,100 was for debris. Crest filed an appeal on April 16. On June 14, DDES filed a motion to dismiss, alleging that Crest's appeal was untimely and insufficient.

5. On July 24, we convened what we believed to be a session to hear argument on DDES's motion to dismiss and, if we decided to deny the motion, conduct a pre-hearing conference to, among other items, set a hearing date. However, after informing the parties of our intent to deny the motion to dismiss, the parties jointly advised us that they were ready to (and wished to) proceed that day with the actual hearing. After a brief intermission, we held the hearing. Earl and Enid Soushek testified on behalf of Crest, with Holly Sawin and Chris Ricketts testifying on behalf of DDES.

6. We held the hearing open one week to allow the parties to submit further evidence. The hearing now closed, we issue our decision on both the motion to dismiss and the penalty itself.

MOTION TO DISMISS – FINDINGS AND CONCLUSIONS:

Timeliness of Crest's Appeal Statement

1. DDES's motion to dismiss Crest's appeal as untimely was predicated on a belief that the pertinent invoice was dated March 9. Several weeks prior to the hearing, we requested that DDES produce any proof of when or even if it actually served the March 9 Invoice on Crest. Conversely, Crest's April 15 appeal attached a March 30 Invoice for an

identical $17,550, along with an envelope showing that DDES did not mail the Invoice until April 10, a full eleven days after the Invoice was dated.

2. There being no evidence when or even if the March 9 Invoice was served on Crest, we find that the pertinent Invoice for purposes of this appeal was the March 30 Invoice, mailed on April 10. Given at least a day for mail, that means Crest likely appealed within three or four days of receipt, sixteen days after the date of the Invoice and two days after a strict reading of KCC 23.32.100(B)'s appeal period of "fourteen days from the date of the invoice" required.

3. This is not, unfortunately, the first situation where DDES substantially delayed the issuance of an Invoice, yet had the temerity to move to dismiss on the basis of untimeliness. In *Webber-Veldwyk*, DDES file no. E1100118, for example, the invoice was not mailed until two weeks *after* the appeal deadline, yet DDES moved to dismiss for failure to meet the fourteen day deadline.

4. We would be hard pressed to see how finding untimely an appeal lodged five days after service and at most three or four days after receipt would possibly accord with even the most conservative understanding of due process or not create a manifest injustice.

Sufficiency of Crest's Appeal Statement.

5. DDES's alternative ground for dismissal is that Crest's appeal statement failed to meet KCC 23.32.100(B)'s requirements. DDES's motion listed the four required items of a penalty appeal, along with a statement that the appeal was missing "one or more of the requirements for a complete appeal." The motion was not particularly helpful, failing to identify the specific missing items. Two of the items – identity of the person filing the appeal and address of the subject property – were obviously present, leaving the last two items, a "description of the violations for which civil penalties were assessed" and a "description of the actions taken to achieve compliance and the date of compliance" for argument at the hearing. We tackle those in turn.

6. Requiring an appellant to describe the violations for which civil penalties were assessed illustrates one of the many shortcomings with the current penalty appeal structure. First, the requirement itself is odd. DDES undoubtedly knows what specifically, of the variety of ways a party could fail to meet an Order or Decision, it believes triggered the penalty. Requiring a party to regurgitate back to DDES precisely how DDES thinks the party was remiss seems a strange exercise. But the code is full of such oddities, and that alone would not be overly problematic.

7. Second, and more seriously, a respondent does not necessarily have notice of exactly what in particular DDES thinks he did that he should not have done, or he failed to do that he should have done. Unlike appealing a notice and order, where the document typically provides respondents a sufficiently detailed description of what DDES believes are the specific violations and necessary remedies, thus putting them on notice of what they need to appeal, an Invoice provides no detail beyond, for example, "Civil Penalty VIO-1" and "Civil Penalty VIO-2." DDES undoubtedly knows the precise issue(s), but the Invoice form does not impart this information to a would-be appellant.

8. That shortcoming is especially acute here for two reasons. First, the controlling documents, DDES's Notice, followed by our Decision, set a variety of milestones over which Crest could have stumbled. Before the end of 2011, Crest was required to remove certain items by October, to remove other items by November, to remove still other items also by November, and to complete permit requirements by December. Crest would have been guessing at what in particular DDES believed had triggered the penalties. Second, Crest did attempt to discern this. The day he received the Invoice, Mr. Soushek emailed DDES, specifically asking "why I am being assessed penalties?" He decided (apparently at the urging of Ms. Soushek) to quickly submit a bare bones appeal and stop the appeal clock before he could discern the precise contours of DDES's displeasure.

9. That was a wise decision, given that DDES, despite having delayed sending the invoice for eleven days, still moved to dismiss here on the basis of untimeliness. Pursuant to our ruling in *Hoverter*, E0901014, wherein we determined that six calendar days (three business days) was sufficient to respond and dismissed the appeal as untimely, had Crest labored a few days more in an attempt to nail down the specifics, we might have determined that its appeal was untimely. Crest's decision to quickly file an appeal with a caveat that, "In spite of numerous requests for information regarding what was not in compliance and how to submit an appeal, no information has been provided by DDES to date so I cannot provide details at this time but respectfully request an appeal of the penalties," was the prudent course.

10. Finally, given that DDES was the party actually possessing the knowledge of the exact "violations for which civil penalties were assessed," there could thus be no unfair surprise to DDES on this score. We do not find the appeal statement fatally flawed for failure to define the violations.

11. DDES's motion to dismiss comes closest to the mark on the final item, a "description of the actions taken to achieve compliance and the date of compliance." Unlike describing the violations for which the penalties were assessed, Crest was the party who knew what compliance efforts it made and when (or if) it believed it achieved compliance. The requirement to describe the actions taken to achieve compliance was displayed at the bottom of the invoice form itself. And the appeal statement was bereft of any discussion of compliance efforts.

12. However, the lack description of compliance seems to follow directly from the lack of information about the exact contours of the actions or non-actions DDES concluded amounted to a finable violation. As described above, Mr. Soushek's appeal statement noted that he had not been given sufficient information "regarding what was not in compliance" and thus he could not "provide details at this time." As Ms. Soushek framed the argument at hearing, Crest needed to know what DDES believed it had violated before it could show how it complied with that item.

13. That argument is especially compelling here where, as noted above, there were multiple benchmarks and trigger points. For example, it could have been that Crest was being fined for belatedly submitting information and documents related to B07L0300, and thus the appeal statement should have described Crest's permit-related efforts. However, as DDES noted at the hearing, though Crest was slightly late on information submittal, this

was not a basis for the fines. Discussion of permit-related compliance efforts, therefore, would have been extraneous in an appeal statement.

14. To be sure, it would have been safer for Crest to, in a sense, use a shotgun and discuss all compliance efforts on any front, and then wait until a hearing to see precisely what DDES was actually concerned about. But given the extremely short turn-around time DDES's delayed Invoice service created, we cannot conclude Crest's approach was unreasonable. Had this case not proceeded directly to hearing on the day of the pre-hearing conference, we could have, per our Rules of Procedure IV(B), required Crest to file a bill of particulars to supplement the appeal statement. As the parties jointly elected to convene a same day hearing, that option became moot.

15. In sum, under the circumstances Crest's appeal statement was sufficient.

MERITS OF THE PENALTY APPEAL – FINDINGS AND CONCLUSIONS

1. Our September 2011 Decision sustained both violations contained in DDES's April 2011 Notice, operation of contractor's storage yard (which related to vehicles and equipment) and rubbish, salvage and debris, and provided dates and requirements for compliance. DDES determined that Crest failed to meet these requirements and issued penalties for both violations. We address first the storage yard and second the debris.

2. For penalty appeals, we look to KCC 23.32.100-.120, and to our Supreme Court's *Post v. City of Tacoma*, 167 Wn.2d 300, 312, 315, 217 P.3d 1179 (2009), which struck down as a violation of "fundamental due process rights" a portion of Tacoma's code enforcement system and prompted the creation of KCC 23.32.100-.120 to allow penalty appeals.

Violation One: Contractor's Storage Yard

3. For the contractor's yard, we found that, "The contents and load within and upon the containers and flat bed truck may be building materials for the proposed construction of a storage building on the site" (emphasis added), concluded that,

> No vehicles or containers are permitted to be stored on the subject property, except that DDES may permit vehicles or containers that are loaded with building materials and equipment specifically related to the building permit for which an application is pending, or which is an active approved permit for the subject property. Tractors that are readily removable from an approved loaded container or flat bed should be removed from the property within 30 days of this decision,

and ordered that,

> The travel trailer on the subject property shall be removed on or before October 20, 2011. Any passenger vehicles or pick-up trucks on the subject property, any tractors readily removable the from the containers or flat bed truck to which they may be attached, and any containers or flat beds other than those which contain building materials specifically related to pending building permit application no. B07L0300, shall be removed on or before November 20, 2011.

4. Photos 1, 3, 4, and 6 of Exhibit 5 contained the equipment/vehicles DDES determined were in violation and warranted imposition of penalties. There was no dispute that the bulk of the items originally on site were timely removed, or at least removed before DDES's February 2012 visit. Only three remained in contention: a truck with a flat trailer attached to it, an empty "low boy" truck, and an excavator.

5. For the truck/trailer in photos 1 and 6, Crest argues that the truck was and is still loaded with components essential to the pending building application, including, nuts, bolts, and tools to put the building back together, and that the trailer is stacked with lumber for the building. Thus the truck/trailer ostensibly qualifies, per our Decision, as a container or flat bed "which contain building materials specifically related to pending building permit application no. B07L0300." The lumber on the trailer is visible in the pictures. The contents of the container on the truck are not, but we find credible Crest's testimony on the contents and, more importantly, that it was ready to open it up and allow DDES to inspect it during DDES's February inspection, but that DDES did not ask about it.

6. DDES did not directly contradict these assertions, but instead noted that there was an earlier (meaning prior to our Decision) "agreement" that the building materials would be housed in other containers onsite. Unfortunately, our Decision does not reference or reflect any such agreement or any such specificity of containers. Allowed remaining items may have been limited to a subset of those items on site as of September 2011 (*i.e.*, Crest could not bring on additional storage containers), but it did not exclude the truck/trailer if it contained building materials specifically related to B07L0300. And the text of our Decision, which neither party appealed, controls our review. At least until DDES requests a review of the contents of the truck and determines them not related to the pending building permit application, the truck/trailer pictured in photos 1 and 6 is not a violation.

7. Turning to the "low boy" truck in photo 4 and the excavator in photo 3, Crest makes a plausible argument for how these two pieces of equipment would be used for the construction they would undertake once it receives its building permit. It might have been wiser if, in addition to allowing "containers or flat beds…which contain building materials specifically related" to the building permit, our Decision had allowed vehicles or equipment that could eventually be used in construction to remain on site. But it did not. In fact, such equipment was explicitly excluded. Unlike the truck/trailer, there is no argument that the low boy or excavator was a storage unit for potentially allowed building materials.

8. Crest maintains that the excavator is used to spread topsoil in conjunction with a clearing and grading permit, and the low boy to haul the excavator. But DDES stated, without objection, that the grading permit had long ago expired. Regardless, the Decision was explicitly limited to "pending building permit application no. B07L0300," not some other application. Crest also maintains that the excavator was not originally on site, and thus not covered by our Decision. The Decision, however, was not limited to specific pieces of equipment. And even if there is a plausible argument that the excavator was technically not a violation because it was not onsite at the time of our Decision, that would still leave the low boy.

9. The question, then, is whether the entire $9,450 fine is warranted or not. A $9,450 penalty may be reasonably calculated to the substantial "contractor's storage yard" that existed on the site at the time of our Decision, but Crest's uncontroverted testimony is that it removed the bulk of the items, including a trailer, flatbed trucks, and other vehicles. To say that two (or possibly only one) pieces of equipment comprise a "contractor's storage yard" is a bit of a stretch. However, even one piece's continuing presence violated the Decision, and thus we cannot conclude that a penalty is unwarranted. In the words of *Post v. City of Tacoma*, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009), the penalty was not "erroneous." But we do find, also using *Post*'s standard, that the full penalty for one or two pieces of equipment would be "excessive." *Cf. id.* We conclude that $2,450 is not excessive, and grant the appeal as to the other $7,000.

Violation Two: Rubbish, Salvage, and Debris

10. As to rubbish, salvage and debris, we found that, "some" of the materials on site in August 2011 were "related to the construction of the proposed storage building; others were not related and appeared to be junk, debris and scrap," concluded that, "All non-construction related materials, junk, debris and scrap should be removed from the property within 60 days of this decision," and ordered that, "All materials, junk, debris and scrap on the subject property, except items related to building permit application no. B07L0300, shall be removed from the subject property on or before November 20, 2011."

11. DDES believed much of what remained onsite in February 2012 was debris. It had pointed to many of the items in the original hearing. The problem, and it may have been a shortcoming on our end, is that our Decision does not appear to have made any such determination. We did not, for example, state that "items X, Y, Z on Exhibit 10(B) are debris and should be removed." Instead, we found that "some" of the materials on site in August 2011 were "related to the construction of the proposed storage building; others were not related and appeared to be junk, debris and scrap." We did not categorize any particular items or exhibits. Our conclusion that, "All non-construction related materials, junk, debris and scrap should be removed from the property within 60 days of this decision," and order that "All materials, junk, debris and scrap on the subject property, except items related to building permit application no. B07L0300, shall be removed from the subject property on or before November 20, 2011" begged the question of what exactly was debris.

12. Crest's fundamental argument is that DDES had a duty, at its February 2012 site visit, to advise Crest what remaining items it believed were debris, and then to give Crest *additional* time to remove those items and come into compliance. That misreads our Decision. Our decision gave Crest until November 2011 to remove any debris. Waiting until after November to have a discussion meant Crest left itself exposed to some very hefty fines.

13. Crest could have avoided such a precarious position by advising DDES of its presumed compliance before the November deadline and requesting an inspection in advance. That would have provided Crest with wiggle room to cleanup any remaining debris before that debris violated the Decision. There is no evidence in the record of this happening prior to

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13. Crest could have avoided such a precarious position by advising DDES of its presumed compliance before the November deadline and requesting an inspection in advance. That would have provided Crest with wiggle room to cleanup any remaining debris before that debris violated the Decision. There is no evidence in the record of this happening prior to

November 20. Any debris onsite as of DDES's February 2012 site visit was a violation of the Decision, subjecting Crest to penalties.

14. We thus turn to photos 2, 5, and 6 of Exhibit 5, which comprised the materials DDES determined were rubbish, salvage, or debris (hereinafter "debris"). On first blush, the materials look to be debris. But as we walked through the photos with the parties, it appears that much of the materials were either not debris or at least were in a grey area warranting further inquiry.

15. Crest pointed to a variety of components of the original building it hoped to use in the proposed building. For photo 2, Crest pointed to the sprinkler system, a red fire ladder, plastic protecting insulation/sheet rock, cabinets with electric components like sockets, exposed electrical materials, a sprinkler system, and compressors, among other items. For photo 5, Crest pointed to electrical component, fencing to protect the construction site once construction began, piping (some of which was cracked), and lumber. For photo 6, Crest pointed to a variety of wood products, as well as brush and debris from when the property was cleared.

16. Listening to DDES's testimony and reviewing the pictures, we find that some of the items were certainly debris, if not originally, then by virtue of having been left out and exposed to the elements for years. For example, bent steel support columns, a bucket of rusted bolts, and severely warped wood, were not, at least by February 2012, "construction related." Crest's response was that it had not bothered to organize or protect the items because it assumed it would quickly get its permit and be able to begin construction. That may or may not have been a reasonable expectation, but it is beside the point. Our Decision provided time to get rid of debris, and any items that had become debris, due to whatever cause, were to be removed by November 20, 2011.

17. Yet Crest certainly made efforts toward compliance. At the hearing Crest discussed, and thereafter submitted receipts (totaling over $1,000) showing debris removal. And other items are in a grey area – not necessarily debris, but not necessarily able to be stamped and approved as conforming building materials. Sorting out material in the grey area could be done at the time of construction, but Mr. Ricketts persuasively explained that at least some of this could be accomplished now. Some items could be tested through simple methods – scraping exposed wood with a knife to check damage, for example – while others might involve lab testing, the costs of which would likely outstrip the benefits from attempting to re-using the material. In his opinion, and we adopt it, "no doubt" certain pictured items were acceptable for re-use while others were not.

18. As with the contractor's storage violation, we find, given the steps Crest took toward compliance and the relative amount of what remains that is actually debris (as opposed to that previously removed or in a grey area), that DDES's imposition of a penalty is not erroneous, but at $8,100 is excessive. We sustain the appeal as to $6,000 of that penalty, and leave stand the remaining $2,100.

19. But that is only the first step for debris. As noted above, there is likely a large grey area of items that would require some inspection to determine whether those items are at least plausibly re-usable in a new construction (even if a final decision on exactly what to re-use would need to await approval of a building permit and final construction

preparations) and what are now un-useable debris. Thus, if Crest wishes to retain the materials on site, it should either enclose the materials in one of the containers on site (or in the case of wood, on top of the other wood on the existing trailer), and/or arrange for (and pay for) Mr. Ricketts or another Building Services Division inspector to visit the site and make a rough cut on what of the non-enclosed material is potentially re-usable and what is debris.

20. We will provide some time for this, and then an additional forty-five days for Crest to remove any items that DDES determines could not be safely re-used for the pending B07L0300 project. But to avoid another misunderstanding, we suggest (but do not order) that if there is any question whether Crest is actually disposing of all the items DDES determines need to be removed, Crest should schedule a re-inspection *in advance* of the date on which additional penalties will attach, to give it some time to clean up any remaining items that could trigger penalties.

21. If Crest fails to meet these deadlines, DDES can re-issue additional penalties. The pertinent code section allows that "Penalties may be assessed daily until the person responsible for code compliance has fully complied." KCC 23.32.010(B). And the Notice similarly provided for penalties "for each day thereafter." Crest can certainly appeal a subsequent penalty decision. (Because the government's "determination to assess additional penalties is based on property conditions at the time of each determination," a citizen must be afforded an opportunity to appeal each penalty determination. *Post v. City of Tacoma*, 167 Wn.2d 300, 312, 314, 217 P.3d 1179 (2009).) We caution Crest, however, that KCC 23.32.100-.120 squarely place the burden on the appellant in a penalty case and greatly limits the scope of the appeal, and the cost of potential penalties, or even the cost of testing some of the material for reuse, may quickly outstrip the potential savings from reuse. Conserving items for potential re-use may normally be a wise strategy, but in the face of looming (and potentially very large) penalties, the equation may change and require a fresh cost/benefit analysis. But it is Crest's prerogative to play it safe or to roll the dice.

DECISION

1. DDES's motion to dismiss is DENIED. Under the circumstances, Crest's appeal was both timely and sufficient.

2. As to the $9,450 penalty for violation one (the contractor's storage yard), Crest's appeal is GRANTED as to $7,000 of the amount and DENIED as to the remaining $2,450.

3. By **September 14, 2012**, Crest should remove the excavator and low boy.

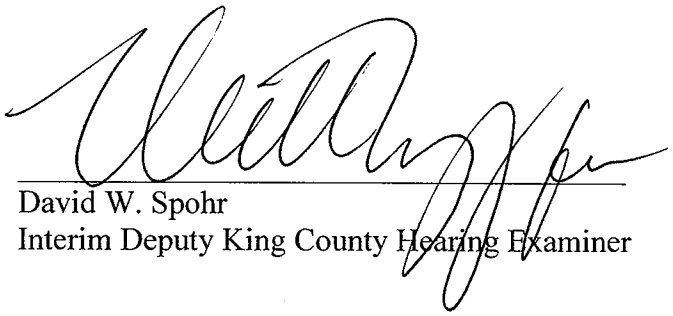
4. As to the $8,100 penalty for violation two (rubbish, junk, and debris), Crest's appeal is GRANTED as to $6,000 of the amount and DENIED as to the remaining $2,100.

5. By **September 14, 2012**, Crest should either (a) remove the remaining materials on site or, if it wishes to retain materials, (b) enclose the materials in one of the containers already on site (or in the case of wood, on top of the other wood on the existing trailer) and/or (c) arrange for someone from the Building Services Division to visit the site and make a rough cut on what of the non-enclosed material are potentially re-usable for the

pending B07L0300 project. After DDES's details what items still need disposal, Crest will have **45 days** to comply.

6. Should Crest fail to meet the above, or the other items contained in the April 5, 2011, Notice and Order, as modified by our September 19, 2011, Report and Decision and now this document, DDES may issue an Invoice(s) for additional penalties, subject to the appeal provisions of KCC 23.32.100-.120.

ORDERED August 10, 2012.



David W. Spohr
Interim Deputy King County Hearing Examiner

NOTICE OF 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 property commenced in King County 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.)

MINUTES OF THE JULY 24, 2012, MOTION HEARING/PRE-HEARING CONFERENCE ON DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E09G0106.

David W. Spohr was the Hearing Examiner in this matter. Holly Sawin and Chris Ricketts participated in the hearing on behalf of the department and Earl and Enid Soushek.

The following Exhibits were offered and entered into the record:

Exhibit no. 1	Development and Environmental Services staff report to the Hearing Examiner for file no. E09G0106.
Exhibit no. 2	Invoice issued March 9, 2012 to Crest Development LLC
Exhibit no. 3	Copy of Hearing Examiner's Report and Decision dated September 19, 2011
Exhibit no. 4	Appeal material from Crest Development LLC
Exhibit no. 5	Photographs of property
Exhibit no. 6	Notes from Permits Plus
Exhibit no. 7	Notice and Order issued April 5, 2011
Exhibit no. 8	Draft of the Motion to Dismiss
Exhibit no. 9	Email string from the Sousheks

The following Exhibit was offered and entered into the record on July 26, 2012:

Exhibit no. 10	Additional emails from the Sousheks

DWS/vsm