

**BEFORE THE DIRECTOR OF THE DEPARTMENT OF CONSUMER AND BUSINESS
SERVICES
BUILDING CODES DIVISION
STATE OF OREGON**

IN THE MATTER OF:

MARK W. DOUD

) **FINAL ORDER**

)

) OAH Case No.: 1303434

) Agency Case No.: 2012-0235

HISTORY OF THE CASE

On August 22, 2013, the Director of the Department of Consumer and Business Services, Building Codes Division (Director, DCBS, Division or BCD) issued a Notice of Proposed Assessment of Civil Penalties and Intent to Revoke Oregon Inspector Certifications and Business Registrations, Final Order on Default with Notice of Contested Case Rights and Procedures to Mark W. Doud (Respondent). On August 28, 2013, Respondent requested a hearing.

On October 8, 2013, DCBS referred the hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Marni Davis was initially assigned to preside over the matter, set for telephone hearing on January 7, 2014. Respondent's November 22, 2013 request for a postponement was granted. Subsequently, the OAH reassigned Senior ALJ Samantha Fair to the matter. The matter was set for a telephone hearing on April 25, 2014. By letter of December 27, 2013, ALJ Fair advised the parties of relevant filing deadlines and other matters pertinent to the upcoming hearing. As of March 11, 2014, Respondent retained Rebecca J. Knapp, Attorney at Law (AAL) as counsel. At the parties' request, the matter was reset for hearing on August 18 and 19, 2014. Due to scheduling conflicts, the matter was reassigned to Senior ALJ Bernadette Bignon.

By letter of May 28, 2014, Ms. Knapp withdrew as counsel for Respondent. By letter of June 23, 2014, Brent H. Smith, AAL, notified the OAH that he had been retained to represent Respondent. ALJ Bignon granted counsel for Respondent's request, unopposed by DCBS, to postpone the hearing to allow for hearing preparation. The hearing was rescheduled for October 6 and 7, 2014. On September 10, 2014, ALJ Bignon granted the Division's good cause request to postpone, unopposed by counsel for Respondent. The parties were directed to contact OAH staff on or before November 21, 2014, to set a new date for the hearing. By letter of October 3, 2014, Mr. Smith withdrew as Respondent's counsel. On October 8, 2014, the OAH issued a Notice of Telephone Hearing for January 6 and 7, 2015.

ALJ Bignon convened a telephone hearing on January 6 and 7, 2015, from the OAH offices in Tualatin, Oregon. Respondent appeared without counsel, represented himself and testified. Senior Assistant Attorney General Katharine M. Lozano represented the DCBS, accompanied by Andrea Simmons, Enforcement and Training Manager, who also testified.

BCD also called the following witnesses: Celina Patterson; Troy Johnson; Chrystal Allen; Alan Rasmussen; Daniel McCarthy; Rex Turner; and John Lindstrom. Respondent called the following witnesses: Wallowa County Commissioners Susan Robert and Paul Castilleja. The record closed at the conclusion of the hearing on January 7, 2015.

On March 23, 2015, ALJ Bignon issued a Proposed Order finding the Respondent violated laws and rules regulating Oregon's state building inspection program pursuant to ORS 455.148, 455.210(3)(c), 455.705; OAR 918-020-0090, 918-050-0100, 918-050-0110, 918-050-1470, 918-050-1480, 918-674-0015, and 918-674-0015(4), ORS 455.740 and OAR 918-098-1500, created additional cost and undue delay to the property owner, and failed to act in the public interest. ALJ Bignon recommended that the Director revoke Respondent's Oregon Inspector Certification 678, Plan Review and Inspection Business Registration SRB 16, Third Party Plan Reviewer and Inspector Certification 173 SRI, and Manufactured Structure Installation Inspection Inspector's Certification 501 MHI are hereby revoked, and further recommending the Director assess a civil penalty against Respondent for \$18,913.45.

On or about April 13, 2015, Respondent filed exceptions to the ALJ's Proposed Order with the Division. The Division has considered Respondent's exceptions, but rejects them.

The Division hereby issues this Final Order.¹

ISSUES

1. Whether Respondent engaged in the following conduct:

- charged fees for and approved structural plans, which included modular construction that he allowed to be reviewed and inspected by a third-party employed by and paid for by the Wallowa County Health Authority;
- failed to ensure the modular structures were properly inspected and approved as evidenced by an Oregon insignia of compliance;
- charged permit and plan review fees above and beyond the fees the local jurisdiction was entitled to collect by charging for work not performed by the local jurisdiction but charged for and performed by another; and
- personally profited from conduct in violation of the relevant laws and rules by receiving a percentage of the overcharged amount.

2. If so, whether Respondent's conduct violated the laws and rules regulating Oregon's state building inspection program pursuant to ORS 455.148, 455.210(3)(c), 455.705; OAR 918-020-0090, 918-050-0100, 918-050-0110, 918-098-1470, 918-098-1480², 918-674-0015, and 918-674-0015(4), as well as whether such violations resulted in additional cost and undue delay

¹ Minor revisions to abbreviations, corrections of typographical errors, and minor factual clarifications have been made to the ALJ's Proposed Order, but only substantive changes to law, and analysis to address Respondent's exceptions have been identified and explained.

² See Notice and Oregon Administrative Rules,

to the Owner as a result of Respondent's failure to act in the public interest and in violation of ORS 455.740 and OAR 918-098-1500.

3. If so, whether the Division's proposed revocation of Respondent's Oregon inspector certifications and business registrations certificates, and imposition of a civil penalty in the total amount of \$18,913.45 is appropriate pursuant to ORS 455.129 and 455.895(9).

EVIDENTIARY RULINGS

Exhibits A1 through A20, offered by the Building Codes Division, and Exhibits R1, R2, R7, R10, and R11, offered by Respondent, were admitted into the record without objection. Respondent's copy of exhibits submitted to the OAH prior to hearing did not include a document marked R9. BCD's objections to Respondent's Exhibits R3, based on relevance, and R4 through R6, based on reliability and relevance, were sustained.

FINDINGS OF FACT

(1) At all times relevant to this matter, Respondent held the following certifications and registrations: Oregon Inspector Certification OIC 678; Plan Review and Inspection Business Registration SRB 16; Third Party Plan Reviewer and Inspector Certification 173 SRI; and Manufactured Structure Installation Inspection Inspector's Certification 501 MHI. (Test. of Simmons; Ex. A1.) Respondent is not, and has never been, certified to conduct plan reviews and/or inspections of prefabricated modular structures by the BCD. (Test. of Simmons.)

(2) On July 9, 2009, Wallowa County (the County) contracted with Respondent to provide services as the Building Official for the County (building official). Under the terms of the contract, Respondent received compensation for his services as building official set as 70% (seventy percent) of the total Specialty Code Plan Review and Permit Fees paid to the County for services provided by Respondent. (Test. of Simmons; Ex. A2.)

(3) At some time after the County contracted with Respondent to act as its building official, the U.S. Internal Revenue Service audited the County. The IRS determined that Respondent's relationship with the County was that of an employee and not an independent contractor. Thereafter, the County employed Respondent as the County's building official. Respondent was not paid a salary. When Respondent became an employee of the County, his pay structure remained the same but the County withheld taxes from Respondent's checks. (Test. of Allen, Roberts.) As before the change, Respondent submitted invoices for work performed to the County. Allen reviewed Respondent's invoices and corrected any calculation errors she found. Allen provided Respondent's invoices to the county commissioners. (Test. of Allen.) A county commissioner reviewed and approved Respondent's invoices before he was paid. (Test. of Roberts, Castilleja and Doud.)

(4) On or about December 2012, Wallowa County Health District, (Owner or WCHD), contracted with Marathon Development, Inc., (Owner's Representative), to build a residential care facility (RCF) (the project) in Enterprise, Wallowa County, Oregon. Troy Johnson of Marathon was the project manager on the development team. Anderson Construction was the contractor. Jeff Sawyer was the senior project manager for Anderson Construction. (Test. of

Johnson.) Owner contracted with LRS Architects (LRS) to be the architectural firm for the overall project. (Test. of Simmons and Johnson.)

(5) The team initially began planning for the project to be built as a standard stick-built, on-site construction project. Dan Edwards, of LRS, was the architect in charge for the project. During initial planning discussions, sometime in December 2011 or January 2012, Edwards and Johnson generated the initial idea to use prefabricated modular (modular) units in addition to the stick-built portions. They proposed using modular construction for part of the project to lower labor costs and shorten construction time. The project team discussed and approved going forward with the hybrid-design of the project, using both modular and stick-built components. (Test. of Johnson; Ex. A3 at 5.)

(6) Andersen Construction subcontracted with Modular Building Systems, Inc., (MBSI), a manufacturer of plant modular units, to construct the modular units. (Test. of Simmons and Johnson; Ex. A3 at 3-5.) Alan Rasmussen, account project manager for MBSI, worked on the project as MBSI's representative. (Test. of Rasmussen; Ex. A3 at 5.) MBSI was the party most experienced with permits for modular units. The modular units would be built off-site and delivered to the project site to be connected to the stick-built portions. MBSI provided insight into the complexity and timing of coordinating inspection, review, building and delivery of the modular units to the site to be joined to the site-built portions. (Test. of Rasmussen.)

(7) Johnson was familiar with stick-built portions of the project and "vaguely familiar" with inspection requirements for off-site modular units when the project started. (Test. of Johnson.) Johnson, as the Owner's Representative, facilitated the effort to move the project forward as quickly as possible. The project was unusual for him because he had not been involved in a hybrid project using stick-built construction and modular units. Johnson was familiar with Respondent in his role as building official for Wallowa County from a prior project under Respondent's jurisdiction. Johnson informed the team that Respondent would be the authority to contact regarding permitting and inspections of the project. (*Id.*)

(8) In January 2012, Edwards and Johnson contacted Respondent to discuss plans for the project. (Test. of Johnson; Ex. A3 at 5-6.) In early-to-mid January, Respondent met with the team for a discussion of the project and permitting requirements. (Test. of Edwards, Johnson; Ex. A3 at 5.) Respondent was present when the team discussed the idea to streamline the process and save money by having one inspection for all parts of the project. At that meeting, Respondent indicated that all permits would have to be pulled through his office. (Test. of Johnson.)

(9) Marathon, as the owner's representative, was the responsible party for pulling the permits for the project. Rasmussen informed the project team that there were plan review and inspection requirements specific to modular units that were different from the usual on-site built construction plans and inspections. He proposed that the team utilize Doug Dick, president and principal owner of On the Level Inspection Concepts, Inc., (OTL). Dick was MBSI's plant inspector. He was knowledgeable about, and had run a BCD-approved prefabricated structure inspection business for the State required approval insignia. Dick also held certifications necessary for the planning and review of the stick-built construction. Rasmussen suggested that

Dick/OTL be hired to review the project concept, the plans for fitting the modular portions to the site-built portions, and for the in-plant plan review and inspections of the modular portions. Rasmussen's proposal was intended to save money by having all plans and inspections performed by one party who would be familiar with all the inspection requirements. (Test. of Rasmussen.)

(10) The team agreed with Rasmussen's proposal. (Test. of Rasmussen.) On or about January 18, 2012, Johnson asked Rasmussen and Sawyer to contact Respondent and bring him up to date on the team's proposal to use one inspector if possible. (Ex. A3 at 3.)

(11) On or about January 19, 2012, Rasmussen called Respondent to discuss project permitting requirements. Rasmussen proposed that OTL be allowed to act as the third-party private contract inspector for the project. In response, Respondent told Rasmussen that all permitting had to be pulled through his office as the building official. Regarding the use of Dick/OTL as a third party reviewer, Respondent told Rasmussen he would consider the idea. (Test. of Rasmussen; Ex. A3 at 1-4.)

(12) Later, after Rasmussen's call with Respondent, Rasmussen and Edwards discussed the earlier conversation with Respondent. Rasmussen told Edwards that Respondent required all permits to be run through his office but that Respondent would consider approving Dick/OTL as a third-party reviewer for the project. In follow up, Edwards forwarded Dick/OTL's qualifications to Respondent for consideration to be approved as the third party reviewer as Respondent had requested earlier. (Ex. A3 at 5.)

(13) Through late January into February 2012, the team continued to work on the process for moving forward with the project through telephone calls and email. Through emails and conversation with various project team members, Respondent communicated his agreement to allow Dick/OTL to perform structural and cover inspections of the modular units at the factory. Respondent required that Dick/OTL contract with the Owner for its services and to have Dick contact Marathon with a proposal contract for Dick/OTL's services. Respondent also required that shop drawings of the modular portions had to be submitted to Respondent for plan review and to be included in the overall master-set of project plans kept by Respondent's office. Respondent requested that RLS send him an email to document the arrangement. (Test. of Johnson and Rasmussen; Ex. A3 at 3.)

(14) By February 2, 2012, Respondent had approved Dick/OTL to review all the drawings for the modular portion of the project, but required all permits be pulled through the building official's office in Wallowa County. (Test. of Johnson; Ex. A3 at 1-5.)

(15) Rasmussen understood from emails regarding the project requirements, and from calls with the parties, that Respondent had approved Dick/OTL to do plan review and inspections of the modular units at the plant, but under contract with the Owner. (Test. of Rasmussen.) In Rasmussen's experience, owners of projects never contracted directly with Dick/OTL. Respondent's requirement that OTL, as the third-party contract inspector, contract with the project Owner did not follow protocol. When Rasmussen and Johnson later discussed the permitting, Rasmussen expressed his concerns that the permitting was not being done as usual for the modular units. Johnson told Rasmussen that Marathon would be responsible for the

permitting overall. Johnson said that Marathon intended to rely on and comply with Respondent's requests because he was the building official for the jurisdiction, ultimately responsible for the project going through. As a subcontractor of the general contractor, Rasmussen did not feel he had authority to change the process that the developer and Respondent had agreed to. (Test. of Rasmussen.)

(16) On or about April 11, 2012, an original application for the building permit was submitted to the Wallowa County building official's office. (Test. of Allen; Ex. A4 at 1.) The initial application was submitted without payment and used to estimate the permit fees. Chrystal Allen, building office technician for the County, logged the permit application and assigned it a number. (Test. of Allen; Ex. A4 at 2.)

(17) On or about May 24, 2012, Respondent spoke with Stephanie Schrader at LRS and told her that he would have permit review comments to LRS by the following week. (Ex. A8 at 3.) Respondent also called McCarthy at WCHD and told him that the permit would cost \$22,487.71. (Test. of McCarthy; Ex. A8 at 2.) The permit was not paid for or issued until June 25, 2012. (Test. of Allen, McCarthy; Exs. A5 at 2, A6 at 6.)

(18) MBSI submitted engineering calculations for the modular units constructed for the project to Respondent. (Test. of Rasmussen; Ex. A7 at 1-4.) MBSI normally provides engineering calculations for its modular units to illustrate and prove that the buildings are built to, and comply with, the International Building Code (IBC) as adopted in Oregon. MBSI's regular business practice is to include the engineering calculations in its submittal to the local jurisdiction where the modular units will be installed. For this project, MBSI's sequence of submitting its engineering calculations was unusual. Respondent had approved a set of drawings provided by LRS architects for the project. Respondent was directing MBSI to submit its drawings as a supplement to the original plans to show how the additional structural modular units would be built. (Test. of Rasmussen; Ex. A7.)

(19) On July 10, 2012, Johnson contacted Dick/OTL by email to request a proposal for OTL's part of the proposed work on the project. Johnson's email confirmed that Respondent would not allow an outside third party contractor to provide full plan review because Respondent had a consultant on retainer that would provide the vertical construction plan review services. Respondent had indicated that he would allow Dick to provide the plan review and plant inspections for the modular portion of the work. As of the date of the email, Respondent had approved the overall project. Respondent had informed Johnson that the modular portions would be treated as "deferred submittals" like those provided for fire suppression and truss/roof framing. Johnson informed Dick that Respondent had issued the permit for the overall project. Johnson confirmed that Dick/OTL would need to include plan review and approval of the modular plans, approved, stamped, and signed. (Exs. A9 at 9-10, A14 at 7-8; test. of Rasmussen.)

(20) Dick/OTL reviewed MBSI's plans. The plans were forwarded to Respondent to be included in the Approved Construction set to be held by the building official as the record set. The building official's record set would be copied and used on site as the Approved Construction set. (Exs. A9 at 9-10, A14 at 7-8; test. of Rasmussen.)

(21) By letter of July 11, 2012, Dick, as president of OTL, agreed to provide plan review and in-plant inspection as the Owner had outlined in an email the day before. Dick's letter set out the parameters of that portion of the project as he understood that Marathon, acting for the Owner, had proposed. Dick reiterated that electrical, fire sprinkler, mechanical or plumbing plans had not been provided for his review because those plan reviews were being done by the local jurisdiction (under Respondent). He noted that additional work outside the scope of the work in the letter would require additional fees. MBSI had valued the structures for which OTL was performing reviews at \$650,000 for purposes of assessing inspection fees. Using the BCD state fee table, Dick calculated that the building code plan review fee (a percentage of the project cost) would be \$2,138.86. Plant fee inspections, based on an hourly rate plus mileage, would be no more than \$3,500.00. (Ex. A3 at 9.)

(22) In the July 11, 2012 letter, Dick reiterated that Marathon had requested that Dick/OTL was not to include on-site building connections inspections during the modular installation. By the terms of the letter, if Marathon requested those inspections at a later date, Dick estimated that the cost would be an additional \$2,600.00 per trip. (Ex. A3 at 9.)

(23) On or about July 15, 2012, Dick/OTL submitted a Notice of Plan Review, approving the plan design by Ken Rasmussen, Alan's father and senior architect, for the modular units for the project. In his Notice, Dick include the following:

This plan review does not cover the design of the foundation, marriage of multiple component structures, connecting the building to its foundation, or exterior stairs and ramps. **This plan review does not include ADA, Electrical, Fire Sprinklers, Mechanical, and or Plumbing code areas.**

(Emphasis in original.) (Ex. A3 at 8.)

(24) On July 17, 2012, Dick asked Johnson about the status of electrical, fire sprinkler, mechanical, and plumbing plan reviews which he had not received. MBSI needed the plan reviews to be complete in order to build those components into the factory-built units as approved by Respondent. (Ex. A9 at 17-18.) Johnson copied Edwards at LRS and asked him to answer Dick's questions. (*Id.* at 16.) According to Edwards, Respondent was managing the permit process outside of what was agreed to between Dick/OTL and Johnson. Edwards deferred to Andersen as the general contractor responsible for the fire sprinkler and truss drawings to be submitted to Respondent. Edwards did not have copies of those plans as of July 17, 2012. (*Id.* at 15.)

(25) On or about July 25, 2012, Respondent submitted an invoice to Allen, billing for the month of June. Respondent completed invoice and the amounts billed were generated by him. Allen routinely checked Respondent's math and hand-corrected any errors. Allen corrected one error in the plans review calculation on the June invoice, and wrote in the corrected figure of .93 cents. (Test. of Allen; Ex. A6 at 2.)

(26) Respondent provided all of the figures on which the permits fees were based. Allen entered fee payments into the office deposit logs on a weekly basis. Allen's only changes to the entries were minor mathematical error corrections. (Test. of Allen.)

(27) Allen also keeps detailed records of how the deposits were allocated, including payments attributed to specific permits and fees. Documentation includes a deposit form for the building codes department, grouping fees received into program categories. The deposit form is signed by Allen for the department and by the County treasurer, documenting the amount paid from the department to the County treasurer's office. (Test. of Allen; Ex. A6 at 3, 5.) Allen also maintains a spread sheet, detailing each transaction. Each transaction record includes the name of the payor, a record number, the total paid, the permit number associated with the payment, the type of permit, the amount of the State BCD surcharge included, any miscellaneous charges, and the plan review fee, if any. (Test. of Allen; Ex. A6 at 4, 6.)

(28) On July 25, 2012, Wallowa County Commissioner Roberts authorized payment of a purchase order for payment to Respondent for the month of June. (Test. of Roberts, Allen; Ex. A6 at 1.) Allen, as part of her regular job duties, generated the purchase order based on Respondent's invoice for the month of June 2012. (Test of Allen; Ex. A6 at 1, 2.) The invoice included, in relevant part, the following:

Structural & Mechanical @ 27%	= Total of \$4,719.53
Plans Review @ 55%	= Total of \$5,945.93
Finals @ .275%	= [omitted] ³

(29) Total fees paid from permit applicants to the building office included \$22,487.71 paid by WCHD for the project's structural permit. The total cost of the permit was calculated based on the fee schedule completed with square footage, cost per square foot and occupancy codes provided by Respondent. The County paid Respondent the agreed-upon percentage of fees received by the building office. (Test. of Allen; Exs. A4 at 2.)

(30) On July 31, 2012, Rasmussen, on behalf of MBSI, submitted the structural plans and calculations to Respondent as "deferred submittals" as he had been instructed to do. (Test. of Rasmussen; Exs. A7, A9 at 24.)

(31) The plans MBSI provided on July 31, 2012 were basic structural design drawings. The drawings and calculations were of the type usually submitted to the jurisdiction in question to show the modules are built to comply with the IBC. In a typical installation, these plans are part of a total package submitted to the local jurisdiction with additional information to show that the prefabricated units meet design requirements that provide for building integrity. The plans were considered "shop drawings." (Test. of Rasmussen; Ex. A7.)

(32) The shop drawings submitted in this case were different from the set usually provided by MBSI. The plans did not include plumbing, electrical, and other components because those portions of the plans had already been drawn by LRS architecture when the project had been planned as stick-built. The documents provided by MBSI were intended to supplement LRS's original drawings and the modular units were to be considered "wings" to the stick-built parts of the project. Dick/OTL reviewed the prefabricated unit plans to ensure that the units met the applicable structural requirements of the IBC code. (Test. of Rasmussen; Ex. A7.)

³ The final review charges on the June invoice were for other projects, unrelated to the project at issue. (Test. of Allen; Exs. A6 at 2,4.)

(33) In early August, MBSI planned to begin building the modules. When Rasmussen contacted Dick about the inspections, Dick insisted on seeing a copy of the plan approved by Wallowa County before allowing construction to begin. Dick told Rasmussen that he needed the approved plans to have a complete picture of the overall project; to have plans on-site at the factory to ensure the portions built in factory lined up with and were compatible with, the site built portions of the plans as approved. Rasmussen asked Andersen to get a copy of the plans from the building official's office. A representative of Anderson went down to the building official's office and got a copy of the approved plans and sent them to Rasmussen. (Test. of Rasmussen.)

(34) When Rasmussen saw the plans, he was "dumbfounded." (Test. of Rasmussen.) The copy that he received had hardly any markings. In Rasmussen's personal and professional experience, plans reviewed and approved by an inspector always have multiple markings, usually handwritten notes throughout, to indicate where adjustments were needed to comply with various code requirements. The copy of the approved project plans for this project had so few notes or marks on them that he was able to photograph the only markings with two photographs taken with his cell phone. He transmitted that information to Dick by email. (Test. of Rasmussen; Ex. A10.)

(35) John Lindstrom performed the fire and life safety review of the project. Lindstrom is currently the building official for the City of Pendleton and for Wallowa County. At the time of the project at issue, he had been a contract inspector for fire and life safety review with Wallowa County. Lindstrom found the project unusual in his experience because of the mixed construction types. When Lindstrom asked Respondent about aspects he found confusing, Respondent told him to worry only about the fire and life safety review and inspection. (Test. of Lindstrom.)

(36) Entities approved as third-party contractors by BCD are only approved to perform factory inspections of modular units for the unit builders (e.g., MBSI). These third-party contractors are not approved to perform modular unit inspection for property owner consumers. OTL was not approved to perform modular unit inspection for Wallowa County Health Care District (Owner) or for Respondent as the Wallowa County Building Inspector. (Test. of Simmons.)

(37) In November 2012, BCD administration asked Rex Turner to work as the building official for Wallowa County, including acting as the building official on the WCHD project. Prior to accepting the position, Turner came to work for BCD in June 2012 as a central regional coordinator for BCD located out of an office in Bend. Turner was responsible for facilitation, coordination and troubleshooting between BCD, the stakeholders and local jurisdictions in Central and Eastern Oregon. Turner had building official credentials and had worked as the building official for Klamath County in the past. (Test. of Turner.)

(38) In a rural county, it is common for the county building official to act as the building official for smaller municipalities that lack the funding or experienced personnel to operate an independent building official's program. In his nine years with Klamath County, Turner managed the entire program for County and, as the building official, was responsible for all areas of building code enforcement delegated to the local jurisdictions from BCD. Turner's

certifications required him to have knowledge of BCD requirements regarding inspection and permitting for various types of projects including those with on-site or stick built, as well as those incorporating modular components. (Test. of Turner.)

(39) At or shortly after the time he accepted the position as Wallowa County Building Official, Turner heard about complications with the WCHD project. Turner received photographs that indicated water intrusion had occurred. (Test. of Turner.) On November 29, 2012, Turner and Jerod Broadfoot, Eastern Oregon Coordinator for BCD, visited the site to determine the extent of the water damage and the remediation required to comply with code requirements. They were escorted through the site by Greg Nourse, project manager for Anderson. (Test. of Turner: Ex. A15 at 1.)

(40) On November 29, 2012, Turner and Broadfoot observed severe water intrusion that had affected, or could possibly affect, multiple elements of the construction, including sheetrock, insulation, electrical wiring, electrical fixtures, mechanical systems, and structural components. The site also showed evidence of possible mold conditions. They also determined that the modular units did not have the required insignia of approval from the BCD. (Test. of Turner; Ex. A15 at 1.)

(41) Turner asked Allen, as the on-site building tech, for the approved set of plans for the project. Allen gave Turner a rolled up set of plans marked in handwriting "approved[,]” indicating that this was the approved set of plans. (Test. of Turner.)

(42) Turner reviewed the set of plans Allen gave him. The approved plans showed the project was coded as an "I-2" classification for the entire project. The I-2 code was appropriate for the modular units because they were to be occupied. As of April 2012, the ICC I-2 square foot occupancy cost was \$148.74 per square foot. (Test. of Turner.)

(43) Turner determined that part of the project should have been coded as "B" occupancy, the commercial classification code. The commercial code should have been used for the stick-built portion of the projects which included common areas such as the offices, a lobby, and some areas for ancillary uses. As of April 2012, the ICC B code occupancy cost was \$119.31 per square foot. (Test. of Turner.)

(44) Additionally, the foundations for the modular units and the roof build on-site to cover the modular units and stick-built portions were uncommon. Normally, the local building official would ask the contractor bidding on the project about the appropriate occupancy code for those areas. In Turner's estimation, those areas should also have been given a B code, for commercial use. Correct coding of the stick-built common areas, the foundations for the modular units and the roof structure build to cover both the modular units and the stick-built common areas would have resulted in lower total permitting costs. (Test. of Turner.)

(45) At the time of the November 29, 2012 site visit, Anderson's workers were removing sheetrock and insulation and drying out wet areas as they found them. As a result of the visit, on December 4, 2012 Turner issued a limited "Stop Work" order to Anderson for the project site. No further construction was allowed pending an approved plan to mitigate the water intrusion issues, and until all building permit documentation for new and existing construction was in

place and approved. The order allowed Anderson's crew to continue its efforts to stop water intrusion, install roofing, removed damaged materials, and dry out the facility to continue. (Test. of Turner; Ex. A15 at 1.)

(46) In December 2012, BCD became aware that the project inspection on the modular units had not been performed in compliance with the legal requirements. (Test. of Johnson; Ex. A17 at 2.) At that time, Celina Patterson, currently BCD's permitting manager, was BCD's manager of statewide inspection, including prefabrication inspection. (Test. of Patterson.)

(47) Andrea Simmons, currently BCD's enforcement and training manager, was enforcement manager and an investigator for BCD's enforcement division at the time. Simmons was assigned as the primary investigator regarding alleged non-compliance issues with the project. Simmons knew when she began her investigation that the project was a hybrid which included site-built and prefabricated modular factory built structures. The building code has separate programs governed by different laws and rules for plan review and inspections of on-site stick-built construction versus plan review and inspections of prefabricated modular units. (Test of Simmons.)

(48) Modular units are completed and closed in the factory. When complete, finished surfaces cover interior electrical, plumbing, and insulation, components which are usually inspected in an on-site stick-built structure after completion but prior to being covered. As such, the components in a modular unit are not visible for inspection after delivery to an installation site. In-plant inspection ensures those components are inspected and are completed to Code prior to being covered. After inspection and approval, the units are marked with an Oregon insignia of compliance which indicates the intended design and use of the unit and confirms the unit's compliance with the applicable Oregon codes. (Test. of Simmons and Turner.)

(49) At the installation site, local jurisdictions are required to ensure that the units delivered to the site have the proper insignia and to oversee the connection of the modular units to the stick-built portion of the project (if the project has both components). (Test. of Turner.)

(50) The Division has not delegated authority to County or, currently, any local jurisdiction, to inspect plans or perform inspections of modular units. Only the Division or an approved third party contractor acting under a contract with the manufacturer may perform the required plan review and building inspections at the manufacturing site for compliance with applicable law and rules. BCD retains jurisdiction for inspection to increase efficiency and lower the costs associated with modular units. BCD ensures that a single inspection process occurs at the point of manufacture and there are no over-lapping or conflicting local inspections for those units. The cost of the modular unit includes the cost of the inspection and the issuance of the required Oregon Insignia of Compliance. (Test. of Simmons.)

(51) As part of the background investigation, Simmons found that Respondent had been the local building official during the relevant time, working for the County, and was responsible for the overall inspection of the site. Respondent had the necessary certification to be a building inspector for the County for site-built projects. He did not have authorization by BCD to act as a third-party inspector under the prefabricated manufactured building program. (Test. of Simmons; Ex. A1.)

(52) As part of her investigation, Simmons reviewed the inspection documents, including the final approved set of site plans, talked to the other parties involved, and visited the project site. (Test. of Simmons.)

(53) According to the site plans Simmons reviewed, the total size of the building was 18,670 square feet. Respondent calculated the valuation of the project for the permit fee schedule based on the total square footage of the project. However, the site-built portion of the project equaled 4,585 square feet. The modular units, at 14,085 square feet, comprised the majority of the project. Respondent's fee included fees for plan review and inspection the modular units, at 14,085 square feet; fees for work that he was not authorized to perform. (Test. of Simmons.)

(54) Respondent's income, as an employee of the County, was unusual in that he was not paid a salary. Because his income was based on a percentage of the income received by the County for work done by his office, Respondent unlawfully received a significantly higher amount for payment on the project based on two factors: 1) Respondent based the permit fee on review and inspection of the total square footage of the modular units and the on-site stick built portion, rather than for just the square footage of the site-built portion; and 2) in addition, Respondent applied an incorrect occupancy code, thereby increasing the permit cost, to the site-built portions of the project. (Test. of Simmons.)

(55) Turner and Simmons also found that Respondent did not actually perform plan review or inspection of either the modular portions of the building or the fire life safety inspection. Respondent had charged Owner for work he did not perform. (Test. of Turner, Simmons.)

(56) Following the investigation, Simmons made recommendations to the BCD. As a result of the investigation and findings, BCD concluded that the appropriate sanctions for Respondent's multiple violations should be revocation of Respondent's Oregon Inspector Certification and his Third Party Plan Reviewer and Inspector Certification because of the egregious nature of the violations across the two very different areas of the building code, the sections which apply to site-built structures and the sections that apply to prefabricated modular units. The building official certification and other code specific certifications allow Respondent to be delegated responsibility for overseeing applicable laws and rules for all eleven divisions within the state building code. Based on the nature and number of Respondent's violations, it is not appropriate for Respondent to oversee the administration and enforcement of the state code. (Test. of Simmons.)

(57) Based on the same violations, BCD concluded that Respondent should not be allowed to operate a business conducting plan review and inspection. In the current matter, Respondent was accountable and overseen as a public official. When operating under his business registration as a third party inspector, Respondent works for private individuals where he would be subject to even less oversight. Therefore, BCD also concludes that Respondent's right to renew his business registration as a third party review, currently expired, should be revoked. (Test. of Simmons.)

(58) Additionally, BCD concluded that Respondent's manufactured structure installation

inspector's certification should also be revoked. Although Respondent was not acting under that certification during the time of the current matter, the codes are similar. BCD concluded that Respondent's refusal or lack of ability to correctly enforce the building codes in this case shows he is unwilling to adhere to or does not understand the limitations of the particular divisions within the state building code sufficiently enough to be certified to enforce it. (Test. of Simmons.)

(59) Under the rules, BCD may use different values to impose civil penalties, depending on the particular facts of the case. Because BCD deemed the nature of Respondent's misconduct egregious, particularly because he was the individual responsible for inspecting to and enforcing the State Building Code in its jurisdiction -- he was functioning as the legal authority -- and because Respondent committed multiple violations, BCD chose not to use a flat assessment per violation but based its proposed penalty under the rule that allows imposition of a civil penalty based on the profit an individual gains from violating the code. (Test. of Simmons.)

(60) Simmons found that the Owner paid \$2138.86.00 to Dick/OTL for the plan review and inspection included in the original contract between Owner and Dick/OTL. (Test. of Simmons; Ex. A13 at 2.) The Owner eventually paid Dick/OTL \$15,825 in additional fees to complete the necessary reviews and inspections to bring the project into compliance with the state building code. (Test. of Simmons; Ex. A13 at 2.)

(61) For purposes of finding the correct fees Respondent should have charged, Simmons determined that the price per square foot based on the correct code should have been \$119.31 (ICC B occupancy code). The total valuation for purposes of the County's permitting should have been based on 4,585 square feet - the square footage of the site-built parts of the project. Simmons determined that the correct fees permit schedule on the County's structural permit application should have been \$1,224.58 (27.5% of \$4,453) for structural permits and \$1,591.95 (55% of \$2,894.45) for plan review. Respondent's incorrect coding and square footage calculations resulted in an overpayment to Respondent of \$3,782.69. (Test. of Simmons; Exs. A4 at 2, A6 at 2-10.) According to BCD's penalty structure, Respondent is subject to a civil penalty of \$18,913.45 (5 x \$3,782.69, the amount Respondent unlawfully benefited). (Test. of Simmons; P1 at 8.)

(62) When MBSI became aware that BCD had questions about the project, Ken Rasmussen wrote to Patterson at the BCD. In a letter of December 5, 2012, Rasmussen explained MBSI's role in the project and clarified that the local building official had been involved in and authorized the hiring of a third party inspection agency to conduct inspections on the BO's behalf during the construction of the modules. MBSI had not been involved in the plan review, approval, inspection, or permitting process. (Ex. A16.)

(63) In a letter of March 1, 2013, Patterson informed MBSI of the irregularities in the project regarding the failure to follow the plan review, permitting, and issuing of "gold tag" insignias of compliance with BCD's modular structures program. BCD noted that OTL had performed inspections of the units as they were being built in the factory. BCD staff reviewed OTL's inspection documentation and also inspected the units. (Test. of Patterson; Ex. A20.)

(64) Patterson told MBSI that BCD inspectors had inspected the modular units. BCD

was willing to grant MBSI an exception and approve OTL's inspection documentation if MBSI would recognize the inspections and have OTL obtain and attach the insignia of compliance. BCD approved this process to allow the project to be brought into compliance and finished. Patterson told MBSI that when BCD received the insignia applications and issued the gold tags, it would allow the owner, the contractor and MBSI to proceed with repairs necessary to bring the modular units and the entire structure into a safe condition. (Test. of Patterson; Ex. A20.)

(65) Patterson also informed MBSI that the acceptance of the inspections did not alter BCD's finding that OTL's contract for those inspections had not been performed in compliance with the building code under its approved relationship with MBSI at the time the inspections had been performed. (Test. of Patterson; Ex. A20.)

CONCLUSIONS OF LAW

1. Respondent engaged in the following conduct:

- charged fees for and approved structural plans, which included modular construction that he allowed to be reviewed and inspected by a third-party employed by and paid for by the Owner under a third-party review agreement that was not approved by BCD;
- failed to ensure the modular structures were properly inspected and approved as evidenced by an Oregon insignia of compliance;
- charged permit and plan review fees above and beyond the fees the local jurisdiction was entitled to collect by charging for work not performed by the local jurisdiction but charged for and performed by another; and
- personally profited from conduct in violation of the relevant laws and rules by receiving a percentage of the overcharged amount.

2. Respondent's conduct violated the laws and rules regulating Oregon's state building inspection program. Respondent's violations and failure to act in the public interest resulted in additional cost and undue delay to the Owner.

3. DCBS's proposed revocation of Respondent's Oregon inspector certifications and business registrations certificates, and imposition of a civil penalty in the total amount of \$18,913.45 is appropriate pursuant to ORS 455.129 and 455.895(9).

OPINION

Burden of Proof

The burden of proving any fact or position falls upon the proponent. ORS 183.450(2), *Harris v. SAIF*, 292 Or. 683 (1982). In a contested case proceeding, the standard by which a party must prove the facts asserted is by a "preponderance of the evidence." *Gallant v. Board of Medical Examiners*, 159 Or. App. 175, 180 (1999). Proof by a preponderance of evidence means that the fact-finder must believe that the facts asserted are more likely true than false. *Riley Hill General Contractor, Inc. v. Tandy Corp.*, 303 Or. 390 (1987). In this case, DCBS must show

that Respondent committed the alleged violations and that the recommended penalty is appropriate. Based on the record, DCBS met its burden that Respondent committed the violations as alleged in the Notice and that the proposed penalties are appropriate.

Respondent, as a building official, certified inspector and as a registered business owner performing specialty code inspections and/or plan reviews, violated the laws and rules governing those certifications and his registration. Based on those violations, the Division's revocation of Respondent's Oregon inspector certifications and business registrations certificates, and imposition of a civil penalty in the total amount of \$18,913.45, is appropriate. Respondent denies any misconduct and opposes any action by DCBS against his individual certifications and his certification as a business owner.

Building Codes Division

Authority to delegate code enforcement to local jurisdictions and restrictions on delegation

ORS chapter 455 enables the Director of the Department of Consumer and Business Affairs [(DCBS)] to "promulgate a state building code[.]" (ORS 455.020) and to adopt rules necessary to develop, implement, administer and enforce a program that relates to the state building code or a specialty code. ORS 455.030(1).

Under the Director, DCBS's Building Codes Division (BCD), creates the state building code by adopting model building codes, standards, and other publications by reference as necessary through the rule making process. ORS 455.020, 455.030, ; OAR 918-008-0000(1).

ORS 455.010, setting forth definitions for chapter 455, provides in relevant part that:

(5) "Municipality" means a city, county or other unit of local government otherwise authorized by law to administer a building code.

(6) "Prefabricated structure" means a building or subassembly that has been in whole or substantial part manufactured or assembled using closed construction at an off-site location to be wholly or partially assembled on-site. "Prefabricated structure" does not include a manufactured dwelling, recreational structure or recreational vehicle, as those terms are defined in ORS 446.003.

(7) "Specialty code" means a code of regulations adopted under ORS 446.062, 446.185, 447.020 (2), 455.020 (2), 455.496, 455.610, 455.680, 460.085, 460.360, 479.730 (1) or 480.545, but does not include regulations adopted by the State Fire Marshal pursuant to ORS chapter 476 or ORS 479.015 to 479.200 and 479.210 to 479.220.

(8) "State building code" means the combined specialty codes.

(9) "Structural code" means the specialty code prescribing structural standards for building construction.

The Director is also responsible for adopting rules that set the standards and qualifications for certification of local building officials and inspectors to ensure effective and uniform enforcement of the state building code. ORS 455.720. The Director may delegate enforcement of the state building code, in part, to local jurisdictions. Where delegation is authorized, ORS 455.675 and ORS chapter 455 sections 685 through 775 pertain to the enforcement of the state building code by municipalities or other local jurisdictions. ORS 455.675 provides that:

For the purposes of the codes of regulations adopted under this chapter, unless the context clearly indicates otherwise, the following substitutions shall be made in any code adopted by reference as part of the state building code:

- (1) "Building official" for "administrative authority."
- (2) "Governing body" for "mayor" and "city council."
- (3) "Municipality" for "city," "county" or other unit of local government.

Requirements governing local building officials

Local jurisdictions that assume responsibility for enforcement of the building code must appoint an individual responsible for administering and enforcing its building inspection program. ORS 455.148; OAR 918-020-0090. Certified building officials and inspectors must, among other things, act in accordance with OAR 918-098-1470, entitled "Duties and Responsibilities of Certified Building Officials, Inspectors, and Plans Examiners[,]" which provides in part that:

(1) Persons who hold an Oregon Inspector Certification or an Oregon Code Certification must act in the public interest in performing their duties as a building official, inspector, or plans examiner, including but not limited to:

(a) Obtaining and maintaining any appropriate national or Oregon Code Certification prior to performing their duties;

(b) Not performing any inspections or plan reviews without holding the appropriate valid certification for the inspection or plan review being performed;

* * * * *

(d) Enforcing all appropriate building code statutes, and rules adopted thereunder, including but not limited to specialty codes, including statewide code interpretations, directives, orders, or other building program requirements and allowing the use of alternate method rulings;

* * * * *

(f) Adhering to all applicable building code statutes and rules adopted thereunder[.]

Additionally, certified individuals who are acting in the capacity of building officials have additional responsibilities. OAR 918-098-1480, entitled "Additional Responsibilities for Building Officials[.]" provides that:

In addition to the above responsibilities, all certified individuals who are performing the duties of the building official shall also:

(1) Ensure a person is properly certified under these rules and meets the minimum experience requirements prior to allowing the individual to perform plan reviews and inspections;

* * * * *

(3) Ensure all applicable building code statutes and rules, including statewide code interpretations, directives and other building program requirements and allowing the use of statewide alternate method rulings are enforced and carried out through their certified individuals in their municipality.

Local jurisdictions may adopt fees necessary for the administration and enforcement of any specialty code for which the municipality has assumed responsibility. ORS 455.210(3). Fees collected by local jurisdictions shall be used for the administration and enforcement of the building inspection program for which the municipality has assumed responsibility. ORS 455.210(3)(c). Local jurisdictions are required to assess fees for building official services as set in BCD's rules. OAR 918-050-0100(2)(c)(A) requires jurisdictions to calculate commercial structural permit and plan review fees using the International Code Council (ICC) valuation tables current as of April 1 of the current year. Where there is no specific category, valuation should be based on the value as stated by the permit applicant. Bids may serve as proof of the value of the work. OAR 918-050-0100(2)(c)(B) and (C). Plan review fees must be configured as a percentage of the permit fee. OAR 918-050-0110 provides that:

(1) A municipality may develop its fee schedule in any reasonable manner to provide for the administration and enforcement of the building code program.

(2) Administrative fees assessed by a municipality to cover administration and enforcement shall be incorporated into a municipality's fee schedule or into the cost of an individual permit item as appropriate. Changes to a municipality's fee schedule must be adopted in accordance with OAR 918-020-0220.

(3) The plan review fees shall be based on a predetermined percentage of the permit fee set by the municipality.

///

Restricted delegation to local jurisdictions

Certain portions of the code may not be regulated or enforced by local jurisdictions. ORS 455.148 sets forth the parameters and restrictions for local jurisdictions which assume responsibility for regulation and enforcement of the code. ORS 455.148, entitled "Comprehensive municipal building inspection programs; building officials; rules; program duration, plan, failure, abandonment and resumption[.]" provides in relevant part:

(1)(a) A municipality that assumes the administration and enforcement of a building inspection program shall administer and enforce the program for all of the following:

(A) The state building code, as defined in ORS 455.010, except as set forth in paragraph (b) of this subsection.

* * * * *

(b) A building inspection program of a municipality may not include:

* * * * *

(D) *Prefabricated structure regulation under ORS chapter 455[.]*

(Emphasis added). Prefabricated structures under ORS chapter 455 do not include manufactured dwellings or recreational vehicles as defined under ORS 446.003. OAR 918-674-0000(1).

BCD oversees prefabrication plan review, inspections and approvals directly or through approved third-party agents. A person may not engage in prefabricated structure plan review approvals or inspections for structures intended for use in the State of Oregon, without being approved to do so. ORS 455.705. "'Plan" means a specific design of prefabricated structure as designated by the manufacturer to be the *working drawings* for production of a unit." OAR 918-674-0005(19)(emphasis added). Third-party agencies may be certified by BCD to perform prefabricated structure plan approvals or inspections. ORS 455.705(3). BCD, or a third-party agency certified by BCD, is responsible for providing plan review and inspections services to prefabricated structure manufacturers with whom they have contracted. OAR 918-674-0015(1), (4).

Accordingly, local jurisdictions are prohibited from regulating or enforcing the building code as it applies to the construction of prefabricated structures. When a project contains a prefabricated structure regulated under ORS chapter 455, the local building officials are responsible for ensuring that the prefabricated structure or component that is installed has been approved by BCD as evidenced by an Oregon insignia of compliance. OAR 918-674-0015(5). With regard to projects involving the installation of prefabricated structures or components, OAR 918-674-0015(5) provides that the local building official is authorized to:

(g) Issue permits and perform plan reviews and inspections of the prefabricated structure foundation;

(h) Review plans, issue permits and perform inspections for site-specific, accessibility, geographic, geologic or climatic code requirements affecting the prefabricated structure;

(i) Issue permits and perform inspections of the electrical, water, gas and sewer connections on and to the prefabricated structure;

(j) Issue permit and perform inspections of the prefabricated structure installation. If a multi-section modular building, inspect connections at the marriage lines to assure that such connections are capable of developing a complete load path as required. If a prefabricated component, inspect connections of the component assemblies to assure that the assemblies are capable of developing a complete load path as required[.]

Special Inspectors

Under ORS 455.020, the Director has the authority to promulgate a state wide building code. One segment of that code, the Oregon Structural Specialty Code (OSSC), 2010 Edition⁴ Chapter 17, allowed building inspectors to authorize special inspectors who were to be employed by owners or owners' contractors. However, OSSC s. 102.2 provided the caveat that, "the provisions of this code shall not be deemed to nullify any provisions of local, state or federal law," and s. 101.4 further specified⁵, "this code is adopted pursuant to Oregon Revised Statutes (ORS). Where in any specific case this code and the statutes specify different requirements, the statute shall govern * * * *"

Respondent argued, and repeated in his exceptions, that his appointment of Dick/OTL as an inspector for WCHD/ Modern was allowed as a building official's appointment of a special inspector. However, under Oregon law and rule as provided above, which supersedes the OSSC under its own terms, requires that prefabricated structure inspections be done only by BCD or third-party contractors approved by BCD and contracting with the prefabricated structure manufacturer. Respondent had no authority to appoint a "special inspector" to conduct prefabricated structure inspections, much less to conduct them under a contract with the Owner or owner's general contractor. Respondent's argument is unpersuasive.⁶

Respondent's conduct in violation of the applicable laws and rules

BCD met its burden of proof, regarding the alleged misconduct. The result of Respondent's misconduct, in addition to violation of the laws and rules, resulted in additional cost to the public and delays in a project designed for the public's benefit.

⁴ The edition in force at the time of the Project.

⁵ The OSSC continues to so specify under the current edition.

⁶ This section of analysis is added to address the issue of special inspections raised by Respondent at hearing and in his exceptions.

The undisputed evidence was that the overall project was complicated because it evolved from a site-built project into a project that would incorporate prefabricated units built off-site into the remaining parts which would be built on the site. Early in the planning process, the project team included Respondent in its discussions to ensure compliance with state building code requirements. Respondent had essentially two sets of duties. First, he was responsible for ensuring that he acted within the scope of his individual Oregon Inspector Certification. Second, as a local building official, he was responsible for the oversight of others working within his jurisdiction; ensuring that inspection and approval of work performed within his jurisdiction was performed lawfully.

When the team decided to go forward with the hybrid project, using prefabricated units and stick-built onsite structures, MBSI proposed using Dick/OTL, its third-party contractor, who was approved by BCD for MBSI's in-factory prefabricated structure plan review, inspection, and approval. Respondent denied that proposal and responded by directing the team to submit all permits to be pulled through his office as the local building official. Respondent, acting as the local building official, required MBSI to submit shop drawings to him for the prefabricated units, to be included in the project permit as "deferred submittals."

Respondent as a local building official was prohibited from regulating prefabricated structures within the local building inspection program. Respondent's requirement that plans for the units be included in the overall permit application to his office and inclusion of the plans into the approved set of site-plans provided to the project's architects violated the restrictions of ORS 455.148(1)(b)(D). Respondent also failed to insure that the prefabricated units that were installed on the project site were approved by BCD through the presence of the required Oregon insignia of compliance in violation of OAR 918-674-0015(5).

Respondent not only allowed, but he required, Dick/OTL as the third-party contractor, to contract with the project Owner, rather than the manufactured-structure manufacturer under BCD's prior approved relationship, for in-factory review of the prefabricated unit plans and for in-factory inspection of the units as they were built. The contract relationship between Dick/OTL and Owner (rather than with MBSI) violated OAR 918-674-0015(4). As a certified building inspector, Respondent failed to act in the public interest in performing his duties in compliance with OAR 918-098-1470(1) and 918-098-1480(1) and (3).

OAR 918-098-1500 sets forth conduct that constitutes grounds for sanctioning building officials and inspectors for misconduct. OAR 918-098-1500 provides in part that:

- (1) Failure to act in the public interest in the performance of their duties in accordance with ORS 455.740 shall include, but not be limited to:

* * * * *

- (c) Permitting, allowing or performing plan reviews or inspections without proper certification;

(d) Engaging in a pattern that fails to enforce the specialty code, including statewide code interpretations, site-specific interpretations, directives or other building program requirements and failure to allow the use of alternate method rulings[.]

Respondent performed work outside the scope of his individual certification when he issued a building permit for the entire project, including the prefabricated units. Respondent was not at the time of this project, nor had he ever been, certified to conduct reviews and enforcement of the code pertaining to prefabricated factory-built units. As a local building official, he failed to properly act within the limitations of his lawful authority under the state building code, violating OAR 918-098-1470(a), (b), (d) and (f) and ORS 455.148(1)(a)(A).

Respondent charged for review of the plans for the prefabricated structures, included as deferred submittals; plans for work which he was not entitled to regulate, in violation of ORS 455.210, OAR 918-020-0220 and 918-098-1500. By doing so, Respondent failed to act in the best interest of the public. ORS 455.740; OAR 918-098-1500(1)(c).

Respondent allowed a third party, employed by and paid for by the project Owner to review and approve the plans for, and perform the inspections of, prefabricated units by a third party that had not been certified by BCD as required. Because Respondent allowed a non-certified third party contractor to perform those reviews, approvals, and inspections, the prefabricated units did not have the required insignias of compliance from BCD when they were installed at the project site in violation of ORS 455.705. Respondent's failure to enforce the state building code was against the public interest and resulted in additional costs and delays to the project, in violation of OAR 918-098-1500 and ORS 455.740.

As BCD proved, Respondent failed to correctly calculate the commercial construction fees for the portion of the project he was authorized to permit under the code. According to rules adopted by DCBS, jurisdictions are required to calculate commercial construction permit fees using the greater of either the valuation of the project based on the ICC (International Code Council) under the rule's formula or the value as stated by the applicant. ORS 455.046;⁷ OAR 918-050-0100(2). OAR 918-050-0100(2) requires that:

(2) Commercial construction permit fees shall be calculated using the following methodologies:

* * * * *

⁷ ORS 455.046 provides in part that :

(1) The Department of Consumer and Business Services shall:

* * * * *

(e) Establish standardized criteria and methodology for determining fee amounts for permits that are required under the state building code established under ORS 455.030[.]

(c) A structural permit fee shall be calculated by applying the valuation to the municipality's fee schedule with a minimum set fee. Valuation shall be the greater of either:

(A) The valuation based on the ICC Building Valuation Data Table current as of April 1 of each year, using the occupancy and construction type as determined by the building official, multiplied by the square footage of the structure; or

(B) The value as stated by the applicant.

(C) When the construction or occupancy type does not fit the ICC Building Valuation Data Table, the valuation shall be determined by the building official with input from the applicant.

Respondent incorrectly coded the on-site stick-built portions of the project under dwelling codes rather than as business-use codes. As opined by Turner, who was qualified by education and experience to offer the opinion, Respondent incorrectly coded those portions which did not fit the under the ICC tables. Under the rule, Respondent failed to base the code for those parts of the project according to the type of structures and the projected use as required. Respondent should have coded those parts as business use, which would have resulted in lower permit fees.

At hearing, Respondent did not offer countervailing evidence to the majority of the allegations against him. Respondent testified that he was unaware that the parties had conceived of, and sought guidance on, the possibility of using a single inspection process for the entire project. Respondent's denial of that knowledge was contradicted by the testimony of the other witnesses and the documentary evidence. The evidence showed that the parties included Respondent in the planning process because they were aware that the local building office would necessarily have to be involved in permitting the project. Respondent attended at least one in-person meeting, participated in more than one telephone call, and received email addressed to him directly or on which he was copied, regarding his requirements for permitting the project. Respondent knew that the parties were following his guidance. Respondent may have been mistaken or may have acted with intent, when he erroneously included the prefabricated units within the matters over which he exercised jurisdiction. Under the applicable laws and rules, Respondent's state of mind is irrelevant. The Director may sanction a building official and/or inspector for violations of the building code, irrespective of the intent of the individual against whom sanctions are sought.

Respondent also denied preparing, or being aware of the terms of, the permit application that the Owner submitted and paid for, and that his office processed. Respondent's denial was not credible. Respondent's practice was to either complete the Fee Schedule portion of the permit himself or to provide that information to Ms. Allen, the building office technician, for her to complete the permit. Ms. Allen's testimony was consistent with her record keeping and with the testimony of the county commissioner who had knowledge of the habits and practice of Respondent while he worked as the County's building official. Respondent, through cross-examination, attempted to present evidence that Ms. Allen had intentionally altered the permit, or

had allowed another party to alter the permit. He presented no evidence that either circumstance had occurred and no reasonable argument to support his speculations. Respondent's theory was not logical and was not supported by the evidence.

Respondent claimed to be unaware that his payment invoice for June included a fee that was excessive, based on the square footage of the entire project, rather than just the permit charge for the site-built portions. Respondent's testimony was not persuasive. Respondent based his fees on a percentage of the square footage of permitted projects. He prepared and submitted invoices for his work to the County for payment. Allen reviewed the invoices for mathematical accuracy and corrected minor errors. Allen did not create or complete Respondent's invoices. Respondent's circular argument, that the large payment for June did not draw his attention because Allen had said his check would be larger than normal, was illogical. Respondent calculated fees on the permit at issue which included fees for work outside of his lawful authority and for work that he did not perform. If Allen had made any such statement, it would have been based on billing information generated by Respondent.

Disciplinary authority

Pertaining to the Director's disciplinary authority, ORS 455.740 provides in relevant part:

(1) Subject to ORS chapter 183, the Director of the Department of Consumer and Business Services may deny, condition, suspend, revoke or refuse to renew a certificate of a building official or inspector if the director finds that the building official or inspector has:

(a) Consistently failed to act in the public interest in the performance of duties;

* * * * *

(d) Committed an act described in ORS 455.125 or 455.129.

The Director may also deny, suspend, condition or revoke a registration, certification, license or other authority of a person to perform work or conduct business issued under laws administered by DCBS or an advisory board if the person fails to comply the laws administered by DCBS or with the rules adopted by DCBS. ORS 455.125(2)(a). Additionally, pursuant to ORS 455.129(2),⁸ DCBS may suspend, revoke, condition or refuse to renew a license, certificate or registration if DCBS finds that the licensee, certificate holder, registrant or applicant:

(a) Has failed to comply with the laws administered by the regulatory body or with the rules adopted by the regulatory body.

* * * * *

⁸ DCBS is authorized to take action under section (2), pursuant to sections (3)(d) and (4) for purposes of licenses or certifications at issue. ORS 455.129.

(d) Has performed work without appropriate licensing, certification or registration or has employed individuals to perform work without appropriate licensing, certification or registration.

* * * * *

(g) Has engaged in business as a specialty code contractor without holding a valid specialty code contractor license, certificate or registration required for the business[.]

* * * * *

(4) The department may administer and enforce subsection (2) of this section in the same manner and to the same extent as any advisory board.

Proposed revocation of Respondent's business registration

BCDS also proposes to revoke Respondent's business registration pursuant to ORS 455.457. Businesses that register to perform specialty code inspections or plan reviews must comply with the rules adopted by DCBS. DCBS rules set out those "actions or circumstances that constitute failure to achieve or maintain licensing competency or otherwise constitute a danger to the public health or safety" for which the Director may take disciplinary action. ORS 455.457(5); OAR 918-090-0000.

Respondent was, until his registration expired, registered as a business that performs specialty code inspections or plan reviews, independent of his employment as a building official, pursuant to ORS 455.457. Specialty code plan review and inspection licensure is regulated under OAR chapter 918 division 90. OAR 918-090-0000, addressing the purpose and scope of the rules, provides in part that:

(1) These rules establish registration requirements for businesses that perform specialty code inspections or plan reviews, and establish license requirements for individuals who perform specialty code inspections or plan reviews who are not employed by the division or a municipality.

(2) Nothing in these rules is meant to change existing requirements for individual certification to perform plan reviews and inspections under OAR chapter 918, division 098, 281, 695, or 780.

OAR 918-090-0930 provides for disciplinary action against an inspection business license and registration in relevant part as follows:

(1) For the purpose of ORS 455.457, failing to achieve or maintain licensing competency or acting in such a manner that otherwise constitutes a danger to the public health or safety includes, but is not limited to, the following:

* * * * *

(q) Violating any Oregon law or the administrative rules adopted thereunder relating to any specialty code; or

(r) Committing any other activity prejudicial to the Oregon Specialty Codes in locations subject to the authority of the registrant or licensee.

As shown by the record, DCBS proved that Respondent committed multiple violations of the laws and rules governing Oregon's building code, under the laws governing his conduct as an inspector and in his role as a local jurisdiction building official. Respondent's conduct violated the laws and rules related to the Oregon Structural Specialty Code, and among other things, resulted in increased costs for, and delay in completion of, a public construction project.

The business registration for a plan review and inspection business may be revoked for violating any Oregon law or administrative rule adopted pursuant to Oregon law and for activities prejudicial to the Oregon Specialty Code. OAR 918-090-0930. Therefore, under OAR 918-090-0930(1)(q) and (r), DCBS may revoke Respondent's specialty code business license and registration.

In summary, DCBS met its burden to prove Respondent violated the state building code as alleged. Pursuant to ORS 455.129, the Director may revoke Respondent's Oregon Inspector Certificate. Pursuant to OAR 918-090-0930, the Director may revoke Respondent's Plan Review and Inspection Business Registration, Third Party Plan Reviewer and Inspector Certification and Manufactured Structure Installation Inspector's Certification.

Civil Penalty

In addition to taking action against an individual's certifications, DCBS is empowered to assess civil penalties for violations of the state building code. ORS 455.895 provides in part that:

(2) The Department of Consumer and Business Services, or an appropriate advisory board, if any, may at its discretion impose a civil penalty against any person who violates the state building code or ORS 446.003 to 446.200, 446.225 to 446.285, 446.395 to 446.420, 446.566 to 446.646, 446.666 to 446.746, 479.510 to 479.945, 479.950 or 480.510 to 480.670, or this chapter or ORS chapter 447, 460 or 693, or any rule adopted or order issued for the administration and enforcement of those statutes. Except as provided in subsections (3), (4) and (9) of this section or ORS 446.995, a civil penalty imposed under this section must be in an amount determined by the appropriate advisory board or the department of not more than \$5,000 for each offense or, in the case of a continuing offense, not more than \$1,000 for each day of the offense.

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(6) Civil penalties under this section shall be imposed as provided in ORS 183.745.

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(9) In addition to the civil penalty set forth in subsection (1) or (2) of this section, any person who violates a provision or rule described in subsection (2) of this section may be required by the department or the appropriate advisory board to forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the department or advisory board that does not exceed five times the amount by which such person profited in any transaction that violates a provision or rule described in subsection (2) of this section.

Rules enacted by the BCD provide guidelines for assessing civil penalties under ORS 455.895. OAR 918-001-0036 provides in part that:

(1) Scope and Authority. This rule sets guidelines for assessing a civil penalty under ORS 446.995 & 455.895.

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(4) Civil penalties may be assessed by a board, the Director, or a board's designee acting as agent for a board. A board or the Director may take into account any appropriate factors, including previous directives, in determining the penalty amount or conditions within an order. The statutorily defined maximum penalty may only be assessed upon a finding of a pattern of violation.

(5) Civil penalties may be assessed in addition to, or in lieu of, the conditioning, suspension, or revocation of a license, certificate of competency, or similar authority issued by the Director[.]

Based on the evidence, BCD appropriately assesses Respondent a civil penalty of \$18,913.45 as permitted under the applicable law. Pursuant to ORS 455.895(9), BCD exercises its discretion and assesses Respondent a fine in the amount equal to five times the amount Respondent profited by unlawfully imposing permit charges in violation of ORS chapter 455. As stated in its rules, BCD may impose the civil penalties in addition to revoking Respondent's certifications issued under the authority of the Director. OAR 918-098-0030(5).

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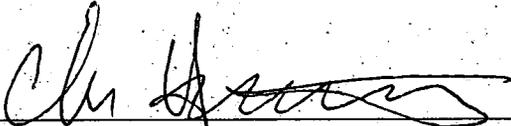
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ORDER

(1) Respondent's Oregon Inspector Certification OIC 678; Plan Review and Inspection Business Registration SRB 16; Third Party Plan Reviewer and Inspector Certification 173 SRI; and Manufactured Structure Installation Inspection Inspector's Certification 501 MHI are HEREBY REVOKED; and

(2) Respondent is HEREBY assessed total CIVIL PENALTY in the amount of \$18,913.45.

DATED this 22 day of May 2015.



Director, DCBS – Building Codes Division

APPEAL RIGHTS

You are entitled to judicial review of this order in accordance with OS 183.482. You may request judicial review by filing a petition with the Court of Appeals in Salem Oregon, within 60 days from the date of this order.

Notification:

Civil penalties become due and payable, and may be recorded and filed with county clerks as liens against property 70 days after issuance of this final order.