December 31, 2008

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
400 Yesler Way, Room 404
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-1654
Email: hearex@metrokc.gov

REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E0601162**

MICHAEL S. PIERCE
Code Enforcement Appeal

Location: 13117 Southwest Tahlequah Road, Vashon

Appellant: **Michael S. Pierce**
470 Wenzel Slough Road
Elma, Washington 98541
Telephone: (360) 482-6068

King County: Department of Development and Environmental Services (DDES)
represented by **Sheryl Lux**
900 Oakesdale Avenue Southwest
Renton, Washington 98055
Telephone: (206) 205-1525
Facsimile: (206) 296-6604

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal with revised compliance schedule
Department's Final Recommendation:	Deny appeal with revised compliance schedule
Examiner's Decision:	Deny appeal with revised compliance schedule

EXAMINER PROCEEDINGS:

Hearing opened:	June 24, 2008
Hearing closed:	June 24, 2008

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 office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On March 31, 2008, the Department of Development and Environmental Services (DDES) issued a Code Enforcement Notice and Order to Appellant Michael Pierce that found a code violation on his RA-2.5 zoned property located at 13117 SW Tahlequah Road on Vashon Island. The Notice and Order cited Mr. Pierce and the property with the following violation of county code:

   A. Construction of additions to a residence (including but not limited to multiple stories and a deck) and/or a structural repair to a residence, without required permits, inspections and approvals and also within environmentally critical areas and/or their buffers.

   The Notice and Order required correction of the violation and compliance by July 7, 2008, either by submittal of a complete application for the required permits, inspections and approvals by such date or by obtainment of a demolition permit and removal of the non-permitted construction work and debris. In the event that a permit was applied for but not approved, then demolition was required to be accomplished within 60 days of permit denial.

2. Mr. Pierce filed an appeal of the Notice and Order making the following claims:

   A. The subject structure consists of "a modification to an existing beach cabin…that modification was completed over 30 years ago." (Emphasis in original)

   B. The structure is sound, although in need of merely cosmetic maintenance.

   C. The structure is a Tahlequah landmark and historic structure, and therefore should be permitted to remain in place.

   The appeal does not dispute the Notice and Order's finding of violation by construction without necessary permits, nor that the construction occurred in critical areas and is thus specially regulated.

3. The property possesses waterfront on Dalco Passage on its southeast side. The construction history germane to the subject proceedings is as follows: A single-story beach cabin and a shed were constructed on the property in or around 1955. (The shed is not at issue in the instant Notice and Order proceeding.) Extensive multi-story additions to and remodeling of the beach cabin were commenced in the 1970s.

4. Portions of the added structure(s) are located within 25 feet of the ordinary high water mark (OHWM) of the shoreline, thus bringing the property under regulation by the state Shoreline Management Act (Chapter 90.58 RCW) and the counterpart King County Shoreline Management Master Program and King County Code.

5. In addition, the entirety of the property is designated as a critical area under Chapter 21A.24 KCC by virtue of qualifying under the steep slope hazard, erosion hazard, landslide hazard, aquatic area buffer and critical aquifer recharge area[1] categories.

[1] Which encompasses the entirety of Vashon Island.

6. There is no evidence and no allegation that the original beach cabin was subject to building permit requirements at the time of construction.

7. The additions/remodeling of the beach cabin with the extensive structural additions performed by the Appellant commencing in the 1970s were subject to building permits.

8. The subject expansion of the beach cabin (a single-family residential dwelling) required sanitation review by the Health Department.

9. The preponderance of the evidence in the record shows that no building permit (or sanitation permit, for that matter) has been obtained for the subject extensive structural additions.

10. The Appellant complains that the subject work was performed over 30 years ago. The implication of that complaint is there should be some amnesty or grandfathering of the work since it was performed so many years ago. There is no legal provision cited, nor any apparent, which provides such amnesty or grandfathering.

11. The Appellant also claims historic status for the subject structure. The preponderance of the evidence indicates that the structure is not designated officially as a historic structure or landmark by either the State of Washington or King County independently. More to the point, even if it were so designated, there is no evident preemption by such status of the building permit requirements which pertained to the subject extensive addition/construction.

12. The preponderance of the evidence supports the finding of violation in the Notice and Order that the subject structural additions were built without the benefit of the required building permit(s), and, furthermore, were built within critical areas requiring special regulatory review.[2]

13. It should also be noted that a structural deck extends from the main residential dwelling structure toward the Dalco Passage waterfront, and indeed extends waterward of the OHWM. The evidence in the record shows that the deck is in a serious state of deterioration, as, it appears, are portions of the open structural foundation. (The property has been subject to a Stop Work Order issued prior to the issuance of the Notice and Order. The structure in its present state is not permitted to be occupied for human habitation.)

14. DDES notes that at a minimum, building permit obtainment for the subject construction work (all of the structural work conducted since the original beach house, *i.e.*, that commencing in the 1970s as stipulated by the Appellant) to be permitted to remain in place in its altered form will require Health Department review, a shoreline variance and the actual building permit review.

15. Appellant Pierce testified that he conducted the remodeling/addition work in 1974 through 1976 and therefore questions whether the shoreline regulations pertain to his construction. Whether they did at the time of construction or not is a moot issue; as noted elsewhere in this report, the structural work consisting of all of the additions/remodeling to the original beach cabin does not

[2]The county's critical areas regulations have evolved overtime, and the current version first effective January 2005 is the successor to the prior sensitive areas ordinance (SAO), which was likely in effect during some or all of the addition construction activity culminating in the structure as it presently exists. Such discussion is essentially moot, however: There has been no property right vesting to any particular version of the critical areas regulations because no building permit has been applied for, which is the critical aspect of invoking vested rights associated with a building construction.

benefit from a vested right of exemption from later-effective land use regulations, because no building permit was applied for.

16. Appellant Pierce testified that he long ago had applied to the county for a setback variance, and had applied to the Health Department for water system approval, and that such applications did not run their complete course. Regardless of the reasons for their not having run their course, the fact is that no permits or variance were actually obtained. Appellant Pierce may have remedies within the respective agencies to pursue completion of those matters, which in the final analysis are not under the Examiner's jurisdiction in this particular appeal case.

17. Appellant Pierce essentially stipulated that he conducted the work without permits and that, although his primary desire is to have the structure stay in place in its present status, he will remove the deck and indeed the entire structure if he deems that the most expedient solution in his deliberations over whether to bring the structural additions into conformity with applicable land use and construction regulations. In such regard, Mr. Pierce states that his property rights are being violated in that there are many other such structures of questionable legality in the area, and that the county should not be applying unequal enforcement in such an untimely fashion (30-plus years after construction). Mr. Pierce also considers the retroactive (retroactive in his assertions) application of land use and building regulations to constitute a taking of his property. Aside from those issues not having been raised in the appeal in a timely fashion, the Examiner would not have jurisdiction over the implied constitutional and equity issues raised.[3]

CONCLUSIONS:

1. The Appellant has essentially stipulated to conducting the structural additions to the original beach house without permits, and the preponderance of the evidence supports the Notice and Order's finding that the construction work was conducted without the required permits, inspections and approvals. The finding of violation in the Notice and Order is accordingly sustained.

2. The necessary building permit shall be required to be obtained, or alternatively, the structure may be demolished and removed in compliance with applicable regulations. Aside from the regulatory requirement of a building permit, there are compelling safety issues involved with the subject structures given the apparent deteriorating nature of certain of the structural components. Building permit review will ensure that the structure, if chosen to be sought to remain in place, will conform to applicable building code regulations, including those regarding structural safety.

3. The violation is the responsibility of Mr. Pierce, as it occurred during his ownership and control of the property. (Mr. Pierce testified that he purchased the property in 1972.)

4. The appeal shall accordingly be denied, except that the compliance schedule set forth in the Notice and Order shall be revised as noted below.

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[3] The Examiner has no authority to grant equitable relief based on allegedly unfair or unequal enforcement. The Examiner is generally limited to applying the law as duly enacted by statute and ordinance, or as established by case law precedent, and has no authority to adjudicate common law issues such as claims in equity. Equity claims would instead have to be brought in a court of general jurisdiction, the Superior Court. [*Chaussee v. Snohomish County*, 38 Wn. App. 630; 689 P.2d 1084 (1984)]

DECISION:

The Notice and Order is sustained and the appeal denied, provided that the compliance schedule is revised as stated in the following order.

ORDER:

1. If the Appellant decides to pursue a building permit for the subject non-permitted structural work on the main residential structure on the subject property, a Critical Areas Designation (CAD) application shall be submitted to DDES *by no later than* **March 31, 2009**. Thereafter all pertinent timeframes and stated deadlines for additional information, response comments, supplementary submittals, etc., if any, related to the CAD application and any of the following application components shall be diligently observed by the Appellant through to permit issuance and final inspection approval. The following additional land use application/building permit application requirements also pertain:

    a. A land use pre-application meeting appointment shall be scheduled by the Appellant with DDES *by no later than* **30 days** after CAD approval by DDES.

    b. A complete Health Department application shall be submitted to the Health Department for domestic water and sanitation approval for the subject structural work *no later than* **60 days** after formal completion of the CAD by DDES, with a copy of the Health Department application sent simultaneously to the Code Enforcement Officer in this case.

    c. Complete applications for a shoreline variance and/or a critical areas variance (as may be required in the formal judgment of DDES) shall be sent to DDES *no later than* **45 days** after formal Health Department approval of the above water and/or sanitation applications.

    d. A building permit pre-application meeting appointment shall be made with DDES *no later than* **30 days** after the later of the above variance(s) approval(s).

    e. A complete building permit application shall be submitted *no later than* **30 days** after the pre-application meeting.

    f. If at any point in the sequence of permit approvals set forth above, any one of the necessary permits/approvals is denied, a complete demolition permit application shall be submitted *no later than* **30 days** after such formal denial, and the demolition and debris removal from the property shall be completed *by no later than* **120 days** after such final denial.

2. If the Appellant decides not to pursue a building permit for the subject structural addition work, all pertinent non-permitted structural work shall be demolished and the demolition debris removed from the property *by no later than* **June 30, 2009**. (A demolition permit is evidently required, including shoreline regulation review; the Appellant shall consult with DDES regarding any such requirements.)

3. DDES is authorized to grant deadline extensions for any of the above requirements if warranted, in DDES' sole judgment, by circumstances beyond the Appellant's diligent effort and control.

DDES is also authorized to grant extensions of the demolition work and deadline due to seasonal or other environmental reasons (potential for erosion, other environmental damage considerations, etc.).

4. No fines or penalties shall be assessed by DDES against Mr. Pierce and/or the property if the above compliance requirements and deadlines are complied with in full (noting the possibility of deadline extension pursuant to the above allowances). However, if the above compliance requirements and deadlines are not complied with in full, DDES may impose penalties as authorized by county code retroactive to the date of this decision.

ORDERED December 31, 2008.

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Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, 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 properly commenced in 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 JUNE 24, 2008, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0601162

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Sheryl Lux representing the Department; and Michael S. Pierce, the Appellant.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	DDES staff report to the Hearing Examiner for E0601162
Exhibit No. 2	Copy of the Notice & Order issued March 31, 2008
Exhibit No. 3	Copy of the Notice and Statement of Appeal received April 16, 2008
Exhibit No. 4	Copies of codes cited in the Notice & Order
Exhibit No. 5	Copies of the current King County Department of Assessments records for the subject property
Exhibit No. 6	Copy of historical King County Department of Assessments records for the subject property (circa 1960)
Exhibit No. 7	Email from Appellant to Sheryl Lux regarding condition of cabin in issue, sent November 14, 2006
Exhibit No. 8	Copies of the Do Not Occupy notice and Stop Work Order, posted by Sheryl Lux on July 27, 2007
Exhibit No. 9a-c	Aerial photographs of cabin in issue, taken 2007
Exhibit No. 10	Photographs of subject property taken by Sheryl Lux on December 7, 2006 and July 27, 2007

PTD:vsm
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