July 11, 2012

OFFICE OF THE HEARING EXAMINER
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REPORT AND DECISION

SUBJECT: Development and Environmental Services File No. **E0800727**

SAMUEL PICKERING
Code Enforcement Appeal

Location: 15015 148th Avenue NE

Appellant: **Samuel Pickering**
9710 200th Place SE
Snohomish, WA 98296
Telephone: (206) 349-8798
Email: chaletscreen@aol.com

King County: Department of Development and Environmental Services
represented by **Erroll Garnett**
900 Oakesdale Avenue SW
Renton, WA 98057
Telephone: (206) 296-7102
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS

Hearing Opened:	October 13, 2011
Hearing Closed:	October 13, 2011

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

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

FINDINGS:

1. This dispute involves two abutting parcels in the A-10 (agriculture zone), a 12.17 acre site (1526059103) containing a barn and other structures (but no house) and a 2.00 acre site (1526059018) containing a house and other structures.

2. Between 1986 and 1987 the then-owner of these lots sold the development rights to the larger parcel to the County, as part of the County's Farmland Preservation Program (FPP) run by the Department of Natural Resources and Parks (DNRP), and then sold both lots (minus the development rights for the larger parcel) to Mr. Pickering's father. Testimony referred to the sale of the development rights as the "covenant."

3. DNRP visited several times after 1993 to verify compliance with the covenant. Through 2001, DNRP concluded that Mr. Pickering's father was meeting the covenant's terms, keeping sufficient tillable surface area and (as far as DNRP knew) using only a small area of the barn for non-agricultural uses. But in May 2007, DNRP determined that the elder Mr. Pickering had violated the covenant by converting the barn to offices and a window screen assembly area and by increasing the non-tillable surface area above the allowable limits (through the carport addition and other activities).

4. In December 2007, Mr. Pickering purchased the property from his father.

5. In June 2008, the Department of Development and Environmental Services (DDES) received a complaint and in July informed Mr. Pickering that he needed to apply for permits for the carport construction and barn conversion and to cease the business operation until he could come within the home occupation rules. In September, Mr. Pickering completed a pre-application meeting, but has taken no further permitting steps.

6. In February 2010, DDES served Mr. Pickering with a Notice and Order, alleging two violations. The first was for construction – both changing the barn to an office, storage, and a window assembly business, and building the detached carport structure – without the required permits. The second was for operating a manufacturing business in violation of the home occupation standards. We will refer to the first alleged violation as "construction" and the second as "home occupation."

7. Mr. Pickering timely appealed. In his statement of appeal, Mr. Pickering did not directly challenged the violative nature of the activities, but asserted that the building and structures were in place when he purchased the property from his father in 2007, that his father had had a window and door screening business on site since 1992, that Mr. Pickering did not have the means to move the business, and that closing the business would negatively impact his and his employee's families.

8. We held a pre-hearing conference on April 5, 2011. In our June 3, 2011, order we detailed which issues were in play and, importantly, which were not. As to Mr. Pickering's claims of the hardships that discontinuing the business would cause, we noted that such claims "are essentially matters of equity, over which the Examiner has no

jurisdiction" and that we could "not adjudicate issues of equity in deciding the appeal." Similarly, we declared that consistency with the covenant was not before us.

9. This case went to hearing on October 13, 2011. Mr. Garnett briefly sketched DDES's position and entered exhibits into the record. Judy Herring with the Department of Natural Resources and Parks testified about her interactions with the Pickerings (initially the father and later the son) and observations about the property in connection with her attempt to verify the Pickerings' compliance with the covenant.

10. As to the timing of construction, Ms. Herring testified that the carport was erected by 2001, and that by her May 2007 site visit the barn had been converted into the current business. Mr. Pickering concurred that the barn has been "the way it is now" since 1992, with the inside construction work having been "done for quite a while." Mr. Pickering purchased the property in December 2007. We find that the construction was completed prior to Mr. Pickering's purchase.

11. Mr. Pickering testified that he was not making noise, not bothering the neighbors (whom he said are at least 2000 feet away) and that there was just one anonymous complaint, he thinks from disgruntled family member. DDES did not object to this. The photo evidence shows a well-maintained establishment, shrouded from the neighbors, with a noticeable absence of junk or debris. Mr. Pickering stated that he was "on the doorstep of bankruptcy" and cannot afford either permits or moving his windows operation offsite. He estimated that to "unwind" and close down the business would take six months.

12. Ms. Herring stated that the covenant allows home occupations only if they comply with the code, requires that the primary use of the property must remain agricultural, and bars adding structures or surfaces not related to agriculture. (Pegging the "primary use" to agriculture is apparently based on income and the relative areas used for agriculture versus other uses.) And there is a five percent non-tillable limit (*i.e.*, the property is only allowed a limited square footage for structures and impervious surfaces). The actual covenant was not entered as an exhibit, and the putative violation of that covenant is not before us. We detail the issue here only because the covenant may complicate resolving the code violations. We make no findings regarding the covenant.

CONCLUSIONS:

1. Mr. Pickering has not challenged whether the construction to change the barn to an office/storage/window assembly business and to build the carport was completed without the necessary permits. The construction violation is sustained.

2. Turning to the home occupation, there is no house on the larger lot that could serve as the "home" to anchor the "occupation." Mr. Pickering has not challenged this. Mr. Pickering apparently would need to merge the two lots before he could qualify his business on the larger lot as a home occupation. The home occupation violation is sustained.

3. Our prehearing order noted that the "innocent purchaser" issue was in play in relation to the construction violation. Mr. Pickering did not purchase the property until December 2007, after DNRP had identified the construction violations. KCC 23.02.130(B) provides that:

> if a property owner affirmatively demonstrates that the action which resulted in the violation was taken without the owner's knowledge or consent by someone other than the owner or someone acting on the owner's behalf, that owner shall be responsible only for bringing the property into compliance to the extent reasonably feasible under the circumstances. Should the owner not correct the violation, only those abatement costs necessary to bring the property into a safe and reasonable condition, as determined by the director, shall be assessed by the county. No civil fines or penalties shall be assessed against such an owner or his or her property interest.

4. Here, Mr. Pickering purchased the property from his father. The intra-family connection would not necessarily preclude innocent purchaser status. One could envision a scenario were a son could purchase a property completely unaware of, and never having consented to, his father's unpermitted construction activities. But Mr. Pickering offered no such testimony. And the code explicitly places the burden on the property owner to "affirmatively demonstrate[] that the action which resulted in the violation was taken without the owner's knowledge or consent." Mr. Pickering has not met his burden. Mr. Pickering has similarly not met his burden to show that the home occupation was a legal, non-conforming use.

5. Coming into compliance may not be feasible, either financially or legally. We are sympathetic to Mr. Pickering's financial hardship, but we have no authority to provide cover for a code violation to continue in perpetuity. We do, however, find that Mr. Pickering's operations seem to be having little or no negative impact on his neighbors or the environment. Still, Mr. Pickering will either need to apply for and receive the necessary permits to legalize the construction and the home occupations, or cease the home occupation and apply for a demolition permit to undo the unpermitted construction. We can extend the deadlines for compliance somewhat, but given that it has been almost four years since Mr. Pickering completed his initial pre-application conference, the time for action is here.

6. The required action here is more complex than the typical code enforcement scenario. There are overlapping issues involving two government agencies acting under two very different powers. The first is DDES, acting in a usual government regulatory capacity, using the zoning code to restrict unpermitted construction and illegal home occupation. That is the subject of the pending appeal.

7. The second involves DNRP, acting in a proprietary capacity as an owner of a covenant on the larger Pickering parcel, enforcing its rights under that covenant. DNRP is asserting not a regulatory power but a right bought and paid for from the Pickering's predecessors-in-interest. The property interest the elder Mr. Pickering purchased in 1986 was a limited one, limited by the terms of the covenant. And that was all he could convey to his son. The testimony at the hearing that, "The code is the only thing standing in our way," may not quite be correct. The code *plus* the terms of the covenant may be standing in the way.

8. We do not address this second component, the covenant, but it may cast a long shadow over, and interfere with, Mr. Pickering's attempts to legalize the construction and home occupation. For example, as a matter of zoning law, Mr. Pickering's home occupation is not allowed because there is no home on that larger parcel. Presumably, Mr. Pickering

could do a boundary line adjustment and merge the two parcels, allowing the occupation to tie into his existing home. Though there was no testimony on the topic and we made no findings, on the surface at least it appears that Mr. Pickering could meet KCC.21A.30.085's requirements. There is seemingly no outdoor storage, storage buildings do not count against the total floor area limits, the parking seems far removed from and well screened from any property line, less than three employees work on-site, items are fabricated onsite, and sales are for off-site delivery. This perception is supported by the comment in the permitting notes from Mr. Pickering's September 2008 pre-application meeting that: "BLA required to remove[] lot line between this lot and lot w/dwelling unit; verifying agriculture program conditions and compliance. Project meets all requirements for home business."

9. The covenant his predecessor-in-interest sold to the County may be an impediment, as the above comment highlights. Would the covenant even allow the parcels to be merged? And how would a merger impact the five percent tillable surface requirement? (Ms. Herring indicated that Mr. Pickering might be able to meet the tillable area requirement on the larger parcel without eliminating any structures if he removed some graveled areas and converted these to bark. But presumably the non-tillable percentage would change for the significantly worse if the parcels were merged and the smaller, more developed parcel were included in an amended calculation.)

10. We do not have the answers, and thus we suggest (but do not order) that Mr. Pickering first work with Ms. Herring to determine what would be feasible vis-à-vis the covenant, after which he can decide what makes the most business sense to pursue with DDES on the permit side. Otherwise Mr. Pickering may discover that he is throwing good money after bad in attempting to legalize something that, although achievable under the code, is precluded by an inherent limitation in his property interest placed there by the covenant his predecessor-in-interest negotiated.

11. Given that almost four years have elapsed since Mr. Pickering completed his initial pre-application conference, the rules, requirements and procedures have likely changed, warranting another pre-application conference if he desires to keep the construction and the home occupation. (Conversely, removing the carport and barn additions and ceasing the home occupation would require only an over-the-counter demolition permit.)

DECISION:

1. We deny Mr. Pickering's appeal. Mr. Pickering may avoid civil penalties by complying with the following conditions.

2. If Mr. Pickering decides to retain the home occupation and related construction, by **August 29, 2012**, call to schedule an appointment for an ABC permit. Within **sixty days** of that pre-application meeting, submit the required, completed applications. This presumably would include a boundary line adjustment application and (depending on whether Public Health approval is required or not) an application to Public Health. DDES should clearly articulate at the pre-application meeting what specifically Mr. Pickering needs to apply for now.

a. If Public Health approval is required, within **sixty days** of the pre-application meeting, submit a complete application to Public Health. Within **sixty days** of Public Health's decision, submit a complete building application to DDES.

b. If Public Health approval is *not* required, or at least not required prior to submittal of a complete building application to DDES, within **sixty days** of the pre-application meeting submit a complete building application to DDES.

3. After submittal, all Public Health or DDES requests for further information pertaining to permit processing shall be met within indicated timeframes. Once approved, the building permit shall be obtained by the Applicant **within 15 days of approval**. Final inspection approval shall be obtained within the **one-year** validity of the building permit.

4. If Mr. Pickering decides to cease operations instead of scheduling a pre-application conference, apply for a demolition permit by **August 29, 2012**. If Mr. Pickering decides to cease operations only after the pre-application conference, apply for a demolition permit within **sixty days** of that pre-application meeting. If Mr. Pickering decides to cease operations only after receiving an agency decision on an application, apply for a demolition permit within **sixty days** of that decision. Mr. Pickering may have the full year provided for in the demolition permit to wind down operations and obtain final inspection.

5. DDES is authorized to grant extensions of the above deadlines if warranted, in DDES's judgment, by circumstances beyond the property owner's diligent effort and control. DDES is also authorized to grant extensions for seasonable, adverse weather and/or environmental impact reasons in the public interest

6. No civil fines or penalties shall be assessed by DDES if the above requirements and deadlines are complied with in full (noting the possibility of deadline extensions pursuant deadlines allowances). Conversely, if the above requirements are not complied with in full, DDES may impose penalties as authorized by county code retroactive to the date of this decision.

ORDERED July 11, 2012.

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David W. Spohr
Interim Deputy King County Hearing Examiner

NOTICE OF APPEAL

Pursuant to King County Code Chapter 20.24, the King County Council has directed that the Examiner make the final decision on behalf of the county regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are property commenced in King County Superior Court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE OCTOBER 13, 2011, PUBLIC HEARING ON DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0800727.

Peter T Donahue was the Hearing Examiner in this matter. Participating in the hearing were Erroll Garnett representing the Department, Samuel Pickering the Appellant and Judy Herring.

The following Exhibits were offered and entered into the record:

Exhibit no. 1	Development and Environmental Services staff report to the Hearing Examiner for file no. E0800727.
Exhibit no. 2	Copy of the Notice and Order issued February 16, 2010
Exhibit no. 3	Copy of the Notice and Statement of Appeal received March 25, 2010
Exhibit no. 4	Copies of codes cited in the Notice and Order
Exhibit no. 5	Photographs of property
Exhibit no. 6	Violation letter to Samuel Pickering from DDES dated July 17, 2008
Exhibit no. 7	Copy of comments screen from pre-application A08PM233
Exhibit no. 8	Copy of comments screen from case E0800727
Exhibit no. 9	Copy of chronology timeline from FPP
Exhibit no. 10	Letter to Nathan Brown, DNRP and Erroll Garnett, DDES from Appellant's former attorney Brian E. Lawler dated June 29, 2009
Exhibit no. 11	Email from Nathan Brown to Erroll Garnett dated October 28, 2009 with attached response to Brian E. Lawer from the Office of the Prosecuting Attorney's Office dated October 23, 2009

DWS/gao

July 11, 2012

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CERTIFICATE OF SERVICE

SUBJECT: Development and Environmental Services File No. **E0800727**

SAMUEL PICKERING
Code Enforcement Appeal

I, Ginger Ohrmundt, certify under penalty of perjury under the laws of the State of Washington that I transmitted the
REPORT AND DECISION to the following parties of record and interested persons:

Elizabeth Deraitus
900 Oakesdale Avenue SW
Renton, WA 98057

Judy Herring
201 S Jackson Street Suite 600
Seattle, WA 98104

Sheryl Lux
900 Oakesdale Avenue SW
Renton, WA 98057

Samuel Pickering
9710 200th Place SE
Snohomish, WA 98296

Toya Williams
900 Oakesdale Avenue SW
Renton, WA 98057

☒ EMAILED to all County staff listed as parties of record/interested persons and primary parties with e-mail addresses on record.

☒ caused to be placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties of record/interested persons at the addresses indicated on the list attached to the original Certificate of Service.

☒ caused to be placed with the United States Postal Service, with sufficient postage, as CERTIFIED MAIL with a return receipt requested in an envelope addressed to the primary parties.

DATED July 11, 2012.

_____
Ginger Ohrmundt
Legislative Secretary

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