

February 5, 1997

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

700 Central Building
810 Third Avenue
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-1654

DECISION ON APPEAL OF NOTICE AND ORDER.

SUBJECT: Department of Development and Environmental Services File No. **E9600348**

MICHAEL PATTERSON
Code Enforcement Appeal

Location of Violation: 1722 264th Avenue Northeast

Owner/Appellant: Michael W. Patterson
1722 264th Avenue Northeast
Redmond, WA 98053-3204

SUMMARY OF DECISION:

Division's Preliminary Recommendation:	Deny the Appeal
Division's Final Recommendation:	Deny the Appeal
Examiner's Decision:	Deny the Appeal

PRELIMINARY MATTERS:

Notice of appeal received by Examiner: May 21, 1996
Statement of appeal received by Examiner: May 21, 1996

EXAMINER PROCEEDINGS:

Pre-hearing Conference: October 22, 1996
Hearing Opened: January 6, 1997
Hearing Closed: January 24, 1997

Participants at the proceedings 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. Review deadlines were waived by all parties.

ISSUES ADDRESSED:

- Nonconforming uses - legality
- Filling within sensitive areas

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

FINDINGS:

1. In early April, 1996, the King County Code Enforcement Section received complaints concerning the filling of a wetland and the expansion of a commercial use on a 12.25-acre parcel owned by Michael Patterson at 1722 264th Avenue Northeast. The property is located in an RA 10-P zone some six miles east of Redmond and just south of the Redmond-Fall City Road. A site inspection was conducted by Code Enforcement officer Lamar Reed on May 6, 1996. On May 9, 1996, the Department of Development and Environmental Services ("DDES") issued a Notice and Order to Mr. Patterson citing the property for unlawful storage of boats, recreational vehicles and junk vehicles; operation of a paint shop and an ornamental iron works in contravention of zoning code prohibitions; construction of building without required permits and inspections; and filling on the property in excess of 100 cubic yards and/or three feet in depth and filling in a sensitive area without required permits and approvals.
2. Mr. Patterson, through his attorney, John Groen, filed a timely appeal of the Notice and Order. Mr. Groen has raised a number of legal arguments challenging the authority of the County's Code Enforcement process, many of which are beyond the scope of this administrative review to consider. As described within a prehearing order issued by this office on October 23, 1996, the issues subject to determination within this proceeding include whether a paint shop, an ornamental iron works and the storage of boats and vehicles on the Appellant's property are nonconforming uses which were lawfully established prior to the adoption of applicable zoning restrictions, and whether the building under construction without permits encroaches upon a wetland or its required buffer. As expanded within the testimony provided at the public hearing, the wetland encroachment question is part of a broader issue as to whether recent filling on the property requires a King County clearing and grading permit application to be filed for its legalization. Mr. Patterson does not contest the existence of the business uses on his property nor the question of whether his partially completed building requires a building permit for its construction. Mr. Patterson has agreed to remove from outside storage on the property any inoperable vehicles.
3. A variety of information has been submitted to the record concerning the historical business use of the Patterson property, much of it in the form of letters and written statements from prior property owners and area residents. Because these statements conflict with one another and are open to questions of bias, we decline to make any findings on the basis of these materials. Since all parties agree that the principal facility used for commercial fabrication and repair work has been is a 52' x 52' shop building, the absence of any such building within a April 6, 1960 aerial photo of the site adequately establishes that such building and its attendant commercial uses did not exist prior to that date. As demonstrated by the County tax records submitted by neighboring property owner William Harper, the shop was constructed sometime

in the early to mid-1960s.

4. Although the storage and repair of logging and excavation equipment seems to have been the first use of the shop by its original owner, Dean Iorns, commercial production at the site of steps and railings by the Cox Wrought Iron and Fabrication, Inc. firm appears to have commenced around 1978. This is confirmed by the testimony of neighboring property owner Harold Christianson and supported by the contemporaneous Cascade Testing Laboratory, Inc. reports submitted by the Appellant. By the time the property was purchased in 1983 by Mr. Patterson, the Cox Wrought Iron business was established as a facility for the manufacturing of stairway systems constructed of wrought iron and precast concrete. In addition to use of the shop building itself, yard areas to its south and west were extensively used for the storage of finished product, concrete forms, aggregate materials, and accessory trucks and heavy equipment.
5. After his purchase of the business in 1983 Mr. Patterson continued operations generally on the same scale previously established by Mr. Cox, employing a crew of up to about six workers. Significant changes began to occur in the late 1980s when Mr. Patterson phased out the concrete fabrication element of the business and focused entirely on manufacturing wrought iron products. The spray application of primer to wrought iron has been consistently an ongoing part of the manufacturing process, but in recent years Mr. Patterson has also rented space to other small businesses engaged in automobile repair, body work and painting activities. In 1988 he began renting out space for the storage of recreational vehicles and boats on a filled and graded portion of the property extending north of the shop. Mr. Patterson testified that he sold the Cox Wrought Iron business in April 1996 and now simply leases space to the new business owner who currently employs six workers. He and his family also now reside in Shelton, although he commutes to the property on a regular basis to oversee his interests.
6. Restrictive zoning was first applied by King County to the property subject to appeal in August, 1958, when pursuant to Resolution No. 18801 it was zoned RA (Residential Area). Applicable zoning regulations at that time limited permitted uses on the site to residential and rural agricultural activities, although the storage of vehicles was also allowed pursuant to issuance of a special use permit. The zoning was changed to Suburban Estates in 1970 and generally preserved the previously established residential and rural agricultural use pattern. No commercial uses of a manufacturing nature were allowed outright, but small-scale home occupations were permitted when clearly incidental to the primary residential use and not intrusive into neighborhood residential patterns. Thus, the zoning limitations on home occupations included restrictions against "outside storage or other exterior indication of the home occupation or variation from the residential character of the property"; "truck delivery or pickup, or the installation of heavy equipment, large power tools or power sources not common to a residential dwelling"; and the creation of "a level of parking demand beyond that which is normal to a residential area."

The policy of primarily permitting only residential and agricultural uses within the zoning regulations for the Patterson property was continued in 1983, when it was classified G-5. Here, however, allowance of home occupations as permitted uses was deleted from the zone regulations in favor of a process for approval of unclassified uses. The listing of allowable unclassified uses includes a number of large-scale facilities of a regional nature but not the kinds of small fabrication and commercial storage activities which historically have

characterized business use of the site.

7. In 1993 the current RA-10-P zoning was applied to the property, with its emphasis on rural residential uses plus small scale farming, forestry, and tourism. An examination of the permitted use tables as they apply to this zone shows that commercial activities such as metal fabrication, auto repair and service, and self-service storage are not permitted uses within the zone, although commuter parking is allowed on existing parking lots located adjacent to arterials.

The 1993 zoning also contains a revision of the County's regulations with respect to nonconforming uses. KCC Chapter 21A.32 allows the continuation as legally nonconforming such uses, structures or site improvements as were "legally established prior to the effective date of this title".

8. The current Notice and Order is not the first Code Enforcement action that King County administrators have initiated with respect to activities on this parcel. In the early 1980s just prior to the purchase of the property by Mr. Patterson, complaints were filed by neighboring property owners concerning the unlawful nature of the commercial activities taking place on the property. Code Enforcement staff has submitted to the record a thick packet of barely legible documents relating to Enforcement Case No. 80-202, which deals with the commercial activities on the property conducted by Joseph Cox. On May 4, 1982, a letter was sent to Mr. Cox concerning Case No. 80-202 by N.V. Peterson, Supervisor of Code Enforcement for the King County Building and Land Development Division, which states as follows:

"On April 30, 1982 our office received affidavits attesting that the present commercial use of the property identified above is not a legal nonconforming use. A review of aerial photographs taken on June 2, 1970, confirm that no commercial use of the property existed at that time. Therefore, commercial use of the property must be discontinued and the property brought into compliance with the zoning code."

9. According to the case log notes submitted for this violation file, discussions continued between Mr. Cox and King County Code Enforcement staff for another eighteen months. The final log note entry is dated October 17, 1983, and appears under the name of Code Enforcement Inspector Ken Dinsmore. It reads as follows:

"An inspection revealed no apparent expansion of the business. The complainants have not contested the legal nonconforming status since their complaint one and one-half years ago. I will close this case under the assumption that this is a legal nonconforming use. Close."

10. In early 1987 a second code enforcement case, File No. 87-182, was opened with respect to the Patterson property at 1722 264th Avenue Northeast. There the concern was with the possible illegal placement of approximately 6,000 cubic yards of fill on the property within the area lying north of the existing shed. Wetland scientist Laura Kaye (now Casey) on June 6, 1988, composed the following report based on her inspection conducted the previous month:

"I field-inspected this site on 5/25/88, and observed a large area of recent (poorly vegetated) fill . . . just upland of the 100-year floodplain A large

forested brush, scrub/shrub wetland exists on both sides of the fill I flagged the wetland edge on both sides of the fill. A line connecting these flags should indicate the wetland edge, which is about one-third into the most recent fill Existing fill consists of concrete chunks, asphalt, logs, etc."

11. Although Mr. Patterson filed a grading permit application to legalize placement of this fill, it seems that the application was eventually abandoned. In any event, the grading violation was dismissed on October 12, 1988, by Randy Sandin, Supervisor of the County Grading Section, based on his determination that all but 400 cubic yards of the fill on the property had been placed prior to 1983 by the previous land owner and that no filling had occurred in the floodplain. While Mr. Sandin determined that filling had occurred in the wetland, he concluded that "it is evident this occurred prior to 1981 and implementation of the Sensitive Areas Ordinance".

12. An examination of the selection of aerial photos submitted to the hearing record suggests that site clearing and filling north of the commercial shop building began in the 1960s and has continued steadily ever since. A comparison of the 1985 and 1990 photos indicates that during the five-year period the fill area was extended north perhaps another 150 feet and squared off to a more nearly rectangular shape.

Although everyone, including Mr. Patterson, agrees that further filling has occurred since 1990, its exact extent is difficult to ascertain. Mr. Harper, who maintains a somewhat alarmist view of developments on the Patterson property, estimates that as much as 2,500 cubic yards of new fill have been placed on the site since 1990. Mr. Harper, however, offered no measurements or data to support his view. Mr. Christianson, who lives across the road and had perhaps the best vantage point for observing the process, estimated that since 1990 as many as 15 to 20 ten-yard dump truck loads of fill have been placed on the site.

13. Lamar Reed, the Code Enforcement Officer who inspected the site in May 1996, seems to have focused on the most obviously fresh and recent filling activity. Although Mr. Reed guessed that the amount of new fill exceeded 100 cubic yards, he had no measurements to back up his estimate. He observed that the new fill had been placed along the eastern edge of the old fill and, to some degree, overlay the old fill. Under questioning Mr. Reed estimated that the new fill area was perhaps 100 feet long, five to six feet wide, and several feet in depth.

14. Mr. Reed also testified that fresh fill had been placed within what he regarded to be a wetland area. He stated that there was standing water to a depth of approximately six inches in the wooded area just east of the fill edge. Although not a wetland scientist, Mr. Reed observed vegetation in the wet area just east of the fill that he recognized to be of a wetland type.

15. Notwithstanding that the technical basis for Mr. Reed's wetland testimony could have been stronger, the photographs taken onsite during his inspection in May 1996 adequately support his analysis. The pictures on pages C and D of Exhibit No. 16 clearly show what only can be described as very fresh fill dirt--uncompacted and devoid of new vegetation. Moreover, the photograph at the bottom of page 16.C displays notorious wetland vegetation growing in and near the fill edge. In the foreground within the fill edge itself are two clumps of soft rush while in the lower left hand corner just beyond the fill are a number of skunk cabbage plants.

1. It is clear from the record that none of the various commercial activities currently existing on the Patterson property are nonconforming uses legally established prior to the adoption of zoning provisions prohibiting their pursuit. All of the current commercial activities--the wrought iron fabrication, the rental of vehicle storage space, and the painting and repair of automobiles--would have been illegal in 1958 when the County first adopted zoning restrictions applicable to this property, and they have been consistently prohibited by applicable zoning provisions ever since. There being no factual basis to support a finding that any of these activities existed prior to 1958, it necessarily follows that each of them was established unlawfully upon implementation subsequent to 1958. Although in the 1970s and early 1980s the zoning provisions in effect on the property would have allowed the legal pursuit of a home occupation, the level of outside storage, delivery traffic and heavy equipment use attendant to the Cox Wrought Iron manufacturing business established during that timeframe disqualifies such activity from being considered a legitimate home occupation.

2. Mr. Groen in his brief on behalf of the Appellant virtually concedes the fact that the current business uses were not legally nonconforming at their establishment. Rather, he argues that the Code Enforcement Section's handling of Case No. 80-202 constituted a final determination by the County that the Cox Wrought Iron business was a legal nonconforming use, which determination (even if incorrect) cannot be collaterally attacked at this point in time. While it is probably beyond our jurisdiction to fully explore a claim based on waiver or estoppel, the factual record before us does not support a conclusion that in 1983 the County made any official determination that Cox Wrought Iron was a legal nonconforming use. The only formal determination in the record is Code Enforcement Supervisor Peterson's letter dated May 4, 1982, stating the contrary position that Mr. Cox's commercial use of the property was not a legal nonconforming use.

Subsequent to that date all we have in the record are informal case log notes, none of which suggest that Mr. Cox was notified either orally or in writing that Mr. Peterson's May 4, 1982, written notice had been rescinded. While we were somewhat surprised that neither the Appellant nor County staff saw fit to call Mr. Dinsmore as a witness, we cannot speculate as to what further information concerning Case No. 80-202 his live testimony might have provided.

3. As a system which is complaint-driven, the County Code Enforcement mechanism often ceases to pursue its goal once the squeaky wheel has become silent. We read Mr. Dinsmore's October 1983 log entry as primarily an acknowledgement that the complainant had stopped pursuing the case some 18 months earlier, and on that basis Mr. Dinsmore had decided to close the file. The fact that this exercise in bureaucratic inertia was accompanied by a dubious rationale favorable to the Appellant's position does not override the essential fact that Mr. Dinsmore's notation was little more than a private reverie unapproved by his supervisor and never communicated to Mr. Cox. As such, it does not rise to the level of a formal County determination concerning the legal status of business uses on the Appellant's property. The 1983 log notes within the file for Case No. 80-202 did not have the effect of converting an otherwise prohibited use into a legal nonconforming use.

4. KCC Chapter 16.82 requires a property owner to obtain a clearing and grading permit for filling activity unless all of the following three conditions are met: 1) the fill is less than three

feet in vertical depth; 2) the total amount of fill is less than 100 cubic yards; and 3) the fill has not been placed within a regulated sensitive area. While we suspect that the amount of new fill placed on the Patterson property since 1990 indeed exceeds 100 cubic yards, the evidence presented at the hearing was not sufficiently precise to allow such a conclusion to be made. However, no amount of fill is allowed to be deposited within a sensitive area, which includes not only a wetland itself but also its regulatory buffer. For a large forested wetland the regulatory buffer would extend at least 50 feet from the wetland edge.

5. Mr. Reed's testimony that he observed wetland hydrology adjacent to the new fill area plus photographic evidence of wetland plants in the fill and adjacent thereto supports a conclusion that filling within a sensitive area has occurred and a clearing and grading permit is required. This evidence is buttressed by Laura Casey's 1988 inspection report identifying the fill area onsite as intruding into and being bounded on two sides by a large forested wetland. The fact that the new fill may have been placed on top of old fill does not absolve the Appellant from the requirement to get a clearing and grading permit if the new fill lies within the wetland buffer. Having triggered the requirement for a grading permit application, it is not necessary within this hearing to anticipate the remainder of the grading permit review process, which may require a more thorough technical evaluation of the exact extent of fill placed on the property since 1990.

DECISION:

The appeal is DENIED. The May 9, 1996, Notice and Order issued to the Appellant is sustained.

ORDER:

No penalties shall be assessed against the Appellant property owner if all of the following actions are taken within the time limits stated:

1. Complete building and grading permit applications as specified within the Notice and Order are submitted to King County within 30 days of the date of this order.
2. The commercial storage of boats, RV's and other vehicles is terminated and all such vehicles removed from the property within 45 days of the date of this order.
3. All commercial painting activities and the wrought iron fabrication business are terminated within 60 days of the date of this order and the equipment used therefor is removed from the property.

ORDERED this 5th day of February, 1997.

Stafford L. Smith, Deputy
King County Hearing Examiner

TRANSMITTED this 5th day of February, 1997, by certified mail, to the following parties and interested persons:

Gauss and Nancy Azami
26520 NE 15th Street
Redmond, WA 98053

Harold Christianson
1700 264th NE
Redmond, WA 98053

John Groen
Attorney At Law
4122 - 128th Avenue SE, #301
Bellevue, WA 98006

Matt and Sonya Clay
26601 NE 15th Street
Redmond, WA 98053-3200

William Harper
16541 Redmond Way, #140C
Redmond, WA 98052-4463

Judith and William Harper
1703 264th Avenue NE
Redmond, WA 98053

Michael Patterson
1722 - 264th Avenue NE
Redmond, WA 98053
Ken Dinsmore, DDES/Building Services
Lamar Reed, DDES/Building Services
Steve Wright, DDES/Building Services

John C. McCullough, Esq.
Market Place Tower, Ste 1130
2025 First Avenue
Seattle, WA 98121

The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one days of issuance of the decision.

MINUTES OF THE JANUARY 6, 1997, PUBLIC HEARING ON DDES FILE NO. E9600348 - MICHAEL PATTERSON CODE ENFORCEMENT APPEAL.

Stafford L. Smith was the Hearing Examiner in this matter. Participating at the hearing were Ken Dinsmore, Lamar Reed, John M. Groen, William Harper, Michael Patterson, Harold Christianson and Judith Harper.

The following exhibits were offered and entered into the hearing record:

Exhibit No. 1	Staff report to Hearing Examiner
Exhibit No. 2	Copy of Notice and Order issued
Exhibit No. 3	Copy of Appeal received
Exhibit No. 4	Copy of portion of Kroll map 953 West
Exhibit No. 5	Copy of SITUS property information
Exhibit No. 6	Copy of letter dated April 18, 1996, from William Harper
Exhibit No. 7	Copy of letter dated May 22, 1996, from William Harper
Exhibit No. 8	Copy of letter dated May 25, 1996, from Dean B. Irons and Penny L. Irons-Lockwood

Michael Patterson - File No. E9600348

Page - 9

- Exhibit No. 9 Copy of letter dated August 9, 1996, from William Harper
- Exhibit No. 10 Copy of letter dated November 15, 1996, from William Harper
- Exhibit No. 11 Copy of letter dated November 21, 1996, from John M. Groen
- Exhibit No. 12 1980 Code Enforcement Case
- Exhibit No. 13 1987 Code Enforcement Case
- Exhibit No. 14 1988 Code Enforcement Case
- Exhibit No. 15 Copy of 1970, 1976, 1985, and 1990 aerial photos
- Exhibit No. 16 Photographs
- Exhibit No. 17 1990 Walker aerial photograph
- Exhibit No. 18 1968 aerial photograph
- Exhibit No. 19 Report from Cascade Laboratory Testing, Inc.
- Exhibit No. 20
 - A-E Photographs that are part of Exhibit No. 19
- Exhibit No. 21 Representative sample invoices
- Exhibit No. 22 Letter dated January 3, 1997, from Hutcherson to Groen and Stephens in support of Pattersons
- Exhibit No. 23 Letter dated November 18, 1996, from Azamis to John Groen in support of Pattersons
- Exhibit No. 24 Letter dated December 9, 1996, from Clays to John Groen in support of Pattersons
- Exhibit No. 25 Letter dated December 26, 1996, from Harper to Groen regarding tax records
- Exhibit No. 26 Aerial photograph taken in 1960
- Exhibit No. 27 Write-up and summary of Harpers' position
- Exhibit No. 28 Complaint filed by Gary Miner in 1987
- Exhibit No. 29 1987-1988 chronology of filling/grading activity
- Exhibit No. 30 Application for grading permit by Patterson
- Exhibit No. 31 Copy of 1958 Code
- Exhibit No. 32 Filling/grading without permits submitted by Harper

SLS:daz

code-enf\e960\9600348.rpt