

**DECISION OF THE HEARING EXAMINER  
CITY OF BAINBRIDGE ISLAND**

**In the Matter of the Appeal of**

**TOOLOEE/MADSEN APPEAL**

**COD000318**

Appeal of an Administrative Opinion of Code Enforcement, Notice of Violation  
Nezam Tooloee and Berit Madsen

**PARTIES PRESENT:**

Ryan Vancil, attorney for appellant  
Nezam Tooloee  
Berit Madsen  
Brian Paige, attorney for the City  
Joshua Machen, Senior Planner  
Megan McKnight, Code Enforcement Officer

**SUMMARY OF REQUEST:**

Nezam Tooloee and Berit Madsen appeal a Determination of the Director of the City of Bainbridge Island Department of Planning and Community Development, dated June 1, 2006, which requires them to remove a wooden structure built within the native vegetation zone of the shoreline in violation of Bainbridge Island Municipal Code Section 16.12.260(B9).

**SUMMARY OF DECISION:**

Appeal denied.

**PUBLIC HEARING:**

The public hearing was opened on September 7, 2006 and thereafter continued until September 28, 2006. Parties wishing to testify were sworn in by the Examiner.

**MINUTES:**

Appearing was JOSHUA MACHEN, Senior Planner, who summarized the staff report which with its attachments, were admitted into evidence and are hereby incorporated by reference. Mr. Machen is a senior planner who has been with the department for approximately 11 ½ years and has been a senior planner for about one year. As a senior planner, his job definition includes Shoreline

Stewardship which involves giving technical assistance to the Code Enforcement Officers. This is a Code Enforcement action surrounding an elevated structure, which is located on a shoreline of statewide significance. The City's Shoreline Master Program designates the upland site as semi-rural environment with aquatic over water environment. The site is zoned residential two units per acre (R-2). The City Comprehensive Land Use map designates the site as open space, residential, two units per acre (OSR-2). The structure, which is the focus of this hearing, is located within the shoreline natural vegetation buffer. The immediate area of the structure is also classified as a geological hazardous area because of the steep slope, which is classified as unstable. Mr. Machen considers the structure an accessory structure to a single-family residence located on the site. It is approximately 16 feet above grade and 22 feet from the bulkhead. Its existence is in violation of Bainbridge Island Municipal Code (BIMC) 16.12.090. Because this is a shoreline of statewide significance, it is heavily regulated as the state has mandated that the public interest in its shorelines be protected.

The structure is located within the jurisdiction of the Shoreline Master Program and as previously stated, it is located in the native vegetation zone buffer adjacent to the shoreline. BIMC 16.12.260 is exclusive. It prohibits all but a few listed structures in the native vegetation zone. This wooden platform is not provided for by the Code and therefore it is prohibited. The structure appears to be approximately 12 feet by 12 feet and is resting on top of two maples, which have been pruned to support the deck of the structure. The platform supports are bolted to the tree. Attached to the structure is a ramp which rests on the slope which has been previously described as a geological hazardous area.

Appearing was NEZAM TOOLOEE, appellant. His wife Berit Madsen did not appear. The structure is a tree house. He built the structure for his children. They had been playing at a tree house not too far from their residence. The tree house eventually caved in. They were concerned about the safety of their children so they built this tree house. The children have used it to play. The appellants insist the tree house is not in violation of the code. It is in the air and not located in the vegetative area because it is built in the trees which are located in the vegetative buffer, above the ground. There is no provision in the code which addresses or prohibits construction of a tree house. He believes he has been singled out for negative treatment because of his political viewpoints and the fact that he is a member of the City Council. The City has not been responsive to his overtures to settle. They have instead requested that he remove this structure. He cannot do so. His children are emotionally attached to it and the family uses and enjoys the structure.

Appearing was JOHN MICHAELSON, the contractor who built the structure for the appellants. He built this structure and took care to insure the health of the trees. The structure is approximately 16 feet from the ground. There is no roof, there are no wires, and it is designed to be used by the children. It is a platform.

He designed the structure as a platform so that the children could build whatever they wanted on the platform. It is a private area for the children to play games and enjoy. It is not in violation of any Code, particularly Uniform Building Code. The platform is intended for them to build something bigger on it. He used traditional methods in building the structure and minimized the number of fasteners used. He submitted into evidence Exhibit 51. In that journal, he refers to the subject structure as a tree house. It is impossible to decrease the square footage of the structure and it would be impossible to realign the beams. The journal he submitted is something he maintained while he was building the structure. In the distant future, this structure could disable the trees unless it is properly maintained and the openings around the trees are enlarged as the tree trunks increase in width. He used six single galvanized light bolts, approximately 12 inches in length, one half of that would have threads on it to secure the structure to the maple trees. He also used four large size bolts and used predrilled holes. He drilled holes about six inches and then inserted the screws. There are three cross beams, which, with regular maintenance, could avoid damage to the trees. He indicated that if the light bolts were removed, the trees would recover from injuries caused by the bolts.

Appearing was SHANNON BOYNINGTON who was the nanny for the children. She testified as to the use, the various games she and the children played on the structure. It is a place the children love to play "pirates", read, eat, get out of the sun, and basically a playhouse for the children.

Appearing was DR. OLAF RIBERIO, who has various degrees and is an arborist amongst other skills and occupations. He inspected the trees. He found no decay at the present time. He did not go on the tree house but observed it from below. He submitted Exhibit 31 which Examiner had previously read and admitted into evidence. His estimate of the structure being 25 feet above shore was an estimate and 16 feet would probably be the correct estimate of distance. He found no indication of disease or of decay at this time. The trees appear to be healthy. Upon questioning from the Examiner, he indicated that he believed the trees would withstand the winds off shore. At some point, if winds are extremely high, the structure could cause damage to the trees. He felt that the railing, which is attached to the floor of the structure and appears to be two by twos spaced four to six inches apart would be sufficient to protect the trees from the wind. He felt that this railing would deflect the wind and helps avoid damage to the trees from the platform, as the trees shifted back and forth against the platform.

At this point the appellants rested pending their Motion for Continuance and additional testimony at a later date. They incorporated by reference all documents hereby submitted.

Appearing was SCOTT BAKER, an arborist who indicated that he had looked at the structure over the lunch hour and that he had previously done a diagnosis

using photographs. He submitted a report (Exhibit 40) which was based upon his review of photographs of the tree and the site. There are visual signs of decay and insect infestation. He has a very high opinion about Dr. Robierro and was hesitant to disagree with him, but it is very obvious that there are visual signs of decay and insect infestation. The trees are suffering from stress. At this time they are suffering from stress because of the weather conditions and the lack of rain. He also disagrees with the Doctor's statements about the railing of the platform reducing wind resistance. It is just not large enough to provide much wind resistance.

Appearing was MEGAN MCKNIGHT, Code Enforcement Officer for Bainbridge Island. She described the history of contact with the appellant and indicated that she is the one who started these proceedings. The structure is located in native vegetation zone which is prohibited by Code. From her perspective, it is a deck with railing and ramp which is located in a geologically hazardous area. It is located in the vegetative zone and in a Shoreline Buffer in violation of Code. The slope in the area of the structure is greater than 40%. The structure is in violation of the Shoreline Master Program.

Reappearing was JOSHUA MACHEN. He had reviewed a copy of the appellant's brief. BIMC Section 16.12.260(B)(9) prohibits any accessory structure other than those specifically listed. This platform structure, or tree house is not a permitted accessory structure within the shoreline environment. Depending on who wants to size the structure, it is from 144 to 185 square feet in size. It is higher than 30 inches from the ground and it is in violation of the above provisions. This is probably an accessory structure as defined by 16.12.030(A)(1). BIMC 16.12.260 outright prohibits development other than specifically authorized. When questioned as to what can be done to keep this facility, he indicated that perhaps they could apply for a variance, although the variance criteria is very strict and they do not appear to meet all of the criteria for a variance. BIMC 16.12.380 sets forth the criteria for a variance. The structure is located on a shoreline of statewide significance. The Shoreline Management Act regulates all activities within 200 feet of the shoreline, and this structure is located well within that 200 feet. The native vegetative zone is a very protected area within the shoreline management program.

Reappearing was SCOTT BAKER, consulting arborist for Bainbridge Island. Rain produces decay. These trees have been topped. The use of cement as Mr. Magnuson has done to protect the tree was something that was done 30-40 years ago. More recent studies have found that the use of cement usually causes more problems than it solves. Mr. Baker has extensive experience with tree houses. Usually they end up removing tree houses as they fall under disrepair and get old. He described the ramp, which rests on the bank and is attached to the deck. The platform is resting on two maple trees that have been topped and have been seriously reduced in size. Galvanized layers have been put at the top of stumps, which are used to support the structure. Drilling holes in

the tree, which has been done, damages the tree and given time, it will decay. Flashing areas will cause problems. Two maples are relatively healthy now but with age more deterioration will show. A tree unattended will destroy the deck and the deck will destroy the tree, or both. Given the steep slope here, there is a possibility of slope failure.

No one spoke further and this matter was taken under advisement until September 28, 2006.

The hearing was reconvened at 12:30 p.m. on September 28, 2006. Parties present were RYAN VANCIL for appellant, BRIAN PAIGE for the City of Bainbridge Island, JOSHUA MACHEN Senior Planner, MEGAN McKNIGHT Code Enforcement Officer, SEAN PARKER architect.

Appearing was SEAN PARKER, architect in charge and responsible for the development, design, and construction of Harbor Square on Bainbridge Island. He has a vast amount of experience in the construction of public facilities such as parks, multi-family dwelling units, and other projects. He is very familiar with the Bainbridge Island Municipal Code. His resume was submitted and marked as Exhibit 55 and admitted into evidence. He has worked on a vast number of projects on Bainbridge Island. He was called as a witness with reference to his experience in working with various structures and the difference between structures.

Appearing was JOSHUA MACHEN who discussed the provisions of the Shoreline Management Program (SMP) and Accessory Structures.

No one spoke further and the hearing was closed at 12:50 p.m. The Hearing Examiner left the record open for submission of additional briefs and arborist reports.

After due consideration of all the evidence in the record, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner on this appeal.

### **FINDINGS, CONCLUSIONS AND DECISION:**

#### **FINDINGS:**

1. The Hearing Examiner has admitted Exhibits 1-57 into evidence into the record, reviewed the same, heard testimony, judged credibility of witnesses, viewed the site, researched the issues, and taken this matter under advisement.
2. Notice of this appeal was filed in accordance with the provisions of Bainbridge Island Municipal Code, see Exhibit 43.

3. The appellants are the owners of a long, rectangular shaped, 1.34-acre site, located at 6600 NE Seabold Road, Parcel No. 332602-2-028-2009. This high bank parcel of property, which abuts Puget Sound, has a steep slope which is an erosion control area. The shoreline is a shoreline of statewide significance according to the maps submitted, and therefore all property 200 feet landward of the ordinary high water mark is subject to the provisions of the SMA. Exhibits 8-17 indicate that this long, narrow, waterfront site has slopes in excess of 40% and wetlands as you approach the Sound. The Exhibits also indicate that the slope of the site is unstable. The slope is classified as an erosion hazard area. The site is improved with a single-family residence, garage, and what the appellants call a tree house which in reality appears to be a deck attached to the steep slope approaching the beach. Exhibits 1-6 indicate that this deck was not there in the year 2002 but was located there in the year 2006. According to the appellant, he hired a contractor to build this deck in the year 2003. They did not apply for any permits or exemptions for the construction.
4. The structure is bolted to maple trees, which form the foundation. According to the contractor, John Michaelson, he built this structure as a platform for the children to build upon. He used traditional methods of construction in building this structure and minimized the number of fasteners used in the construction process. The cost of construction was about \$3000. The platform is a piece of work artificially built or composed of parts, joined together in a definite manner above the surface of the ground. It meets the definition of a structure as defined by BIMC 16.12.030(A)(176).
5. The issues in this appeal center around the existence of this very handsome deck-like structure, which is located within a shoreline of statewide significance. In order to better understand the issues surrounding this structure, it is necessary to review the provisions of the Shoreline Management Program (SMP). As previously stated, this site is located on a shoreline of statewide significance and therefore it is subject to the Shoreline Management Program.
6. The Bainbridge Island Shoreline Management Program is mandated by the provisions of the Washington State Shoreline Management Act (SMA). (See RCW 90.58 et. seq.) The legislature, in enacting the SMA of 1971, declared that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to the utilization, protection, restoration, and preservation of the shoreline. In addition, it found that there are ever increasing pressures of additional uses being placed on the shorelines, necessitating increased coordination in the management and development of the

shorelines. The legislature further found that much of the shoreline of the state and the uplands adjacent thereto are in private ownership, that unrestricted construction on the privately owned, publicly owned shorelines of the state is not in the best interest of the public; and therefore coordinating planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time recognizing and protecting private property rights consistent with public interest. The legislature indicated there is a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by the federal, state, and local governments to prevent the inherent harm in uncoordinated and piecemeal development<sup>1</sup> of the state's shorelines. The legislature went on to declare that it is the policy of the state to provide for management of the shoreline of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure that development of these shorelines in a manner which, while allowing for limited reduction of the rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse interest to the public health, the land and its vegetation and wildlife, and the waters of the state, and their aquatic life while protecting generally public rights of navigation and corollary rights incidental thereto. See RCW 90.58.020 See also RCW 90.58.900 which provides that the SMA of 1971 is to be broadly construed in order to protect the state's shorelines as fully as possible. A liberal construction of the act is also mandated by the Washington State Environmental Policy Act of 1971. Any development on the shoreline is subject to the provisions of the SMA, See Hunt v. Anderson, 30 Wn. App. 437 (1981). The primary purpose of the SMA is to protect the state's shorelines as fully as possible. See Lund v. Department of Ecology, 92 Wn. App. 329 (1998). See also Bellevue Farmers Association v. Shorelines Hearing Board, 100 Wn. App. 341 (2000).

7. As previously stated, the site is located on a shoreline of statewide significance. The SMA of 1971 designated certain shorelines of Bainbridge Island as shorelines of statewide significance because these shorelines are resources from which all people in the state derive benefit, preference is given to uses which favor public and long-range goals. The policies require that we recognize and protect the statewide interest over local interest. It is incumbent upon the City officials to preserve the natural character of the shoreline. They are to designate and administer shoreline environments and use regulations to minimize damage to the ecology and environment of the shoreline as a result of manmade intrusions on the shorelines. The intent of this designation to protect the resources and ecology of the shoreline, to minimize development of activity that will

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<sup>1</sup> See RCW 90.58.030(3)(d) defines development as "a use consisting of the construction ... of structures..."

interfere with the natural functioning of the shoreline ecosystem, including but not limited to stability, drainage, aesthetic values, and water quality. All shoreline development should be located, designed, constructed, and managed to avoid the disturbance of and to minimize the impacts on fish and wildlife resources, including spawning, nesting, rearing, and habitat areas and migratory routes. The SMP provides with reference to water quality that it is the policy to establish setbacks that minimize negative impacts to water quality.

8. The SMP is intended to implement the Shoreline Management Act by planning for and guiding the orderly development<sup>2</sup> of the shoreline, protecting shoreline resources, and helping to insure public access to the shoreline. The SMP helps both property owners and city and state staff in the permitting process. It also educates the community in the use and protection of its shorelines. Amongst other things, the purpose of the Act indicates that its paramount objectives are to protect and restore valuable natural resources, that the shoreline represents, and to plan for and foster all "reasonable and appropriate uses" that are dependant upon waterfront location which offer the opportunities for the public to enjoy state shorelines. The Bainbridge Island Shoreline is home to a quarter of the Island's residents as well as numerous species of fish and wildlife. Bald eagles, herons, seals, otters, and numerous waterfowl depend on this shoreline. There are also salmon streams and bays necessary for fish, shellfish, clams and vegetation to survive. Section 3 of the SMP provides:

all new shoreline uses and shoreline modification activities, including those that do not require a shoreline substantial development permit, must conform to all the applicable goals, provisions, general provisions, environment designation provisions (including the shoreline environment), specific shoreline use provisions, and shoreline modification activity provisions. Shoreline modification activities must be in support of an allowable shoreline use which conforms to the provisions of the Master Program, except as otherwise noted, all shoreline modification activities not associated with a legally existing or approved shoreline use are prohibited.

SMP indicates that with reference to environmental impacts on page 35, that:

all shoreline uses and activities shall be located, designed, constructed, and managed to minimize adverse impact to fish and wildlife resources, including spawning, nesting, rearing, and habitat areas and migratory routes.

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<sup>2</sup> See BIMC 16.12.030(52) which defines development as "a use which consisting of construction... of structures."

9. With reference to environmentally sensitive areas, such as a geologically hazardous area, the SMA provides that development should be located away from shorelines that have been identified as unstable, as in this case, or sensitive to erosion to avoid the hazardous condition and/or property damage as well as to protect the valuable critical areas. Areas adjacent to environmentally sensitive features such as we have in this case, and native vegetation zone uses should be regulated to protect the environmentally sensitive features. All development should be set back far enough to avoid damage to said features and the native vegetation zones.
10. With reference to native vegetation zone, the SMP provides that native vegetation zone is a required vegetation buffer encompassing all uplands from the ordinary high water mark to in this case 50-feet from the ordinary high water mark. Its purpose is to protect and enhance the Island's natural character, water quality, native plant communities, and wildlife habitat along the shoreline. The policies regarding native vegetation zones indicate that preservation of native plant species is key to maintaining the ecology of the shoreline as well as preserving the Island's natural character. The native vegetation zone is within the shoreline jurisdiction and must be protected and maintained and enhanced. Development should preserve existing environmental features to minimize disturbances of natural systems. Native vegetation zone upland of ordinary high water mark should be established for each shoreline use and shoreline environment recognizing the pattern of development and the ecology of the shoreline. Clearing, grading or construction may not be undertaken within the native vegetation zone unless specifically provided for...
11. With reference to residential development the policies of the SMP indicate that it is important to recognize the single purpose, irreversible, and space consumptive nature of the shoreline residential development.

New development should provide adequate setbacks and native vegetative buffers from the water and ample open space and sideyard to preserve the views for both land and water and to protect natural features and plankton. New residential development and accessory uses should be prohibited from locating in environmentally sensitive areas (and the native vegetation zones) including marshes, bogs, swamps, mud flats, underlying steep or unstable slopes, flood ways, fish and wildlife habitat, migratory routes, spawning, and marine vegetation areas.

See page 89 of SMP. Regulations with reference to the SMP residential development indicate that vegetation area zones should be established. A total area of the native vegetative zones shall consist of the area equivalent to the length of the property along the shoreline times the depth

required for the environment in this case 50 feet. Regulations also provide (page 90) that no accessory structures shall be located within a required native vegetation zone except a stairway to the beach, a tram, pier, or dock, a boathouse, a deck less than 30 inches in height above grade, and fences provided that they conform to all other City and State requirements including provisions of the Master Program. It is interesting to note that all stairways to beaches require a building permit and conform to standards as established by a building official.

12. With the above provisions in mind, we turn to the issues involved in this case. As previously stated, this appeal involves the construction of a platform within 50 feet of the ordinary high water mark of a shoreline of statewide significance.
13. Around the first part of February 2006, City staff received a report that there appeared to be a deck-type structure in the shoreline native vegetative zone on the appellants' property and that it was there without shoreline authorization. Upon investigation by the City, the City indicated that a review of past permits on this property did not include approval for construction of this structure. See Exhibit 19.
14. On February 17, 2006, Megan McKnight notified Mr. Tooloee and Ms. Madsen that construction of a deck-type structure within the native vegetation zone on a geographically hazardous area without a building permit or shoreline authorization on the above parcel appeared to be in violation of code. She indicated that the construction was in violation of Chapter 15.08 (16.12) and 16.02 of the BIMC. She further indicated that a building permit is required to be issued before construction commences (BIMC 15.04.03A and 15.04.040A). A geotechnical analysis containing information specified by a City Engineer which concludes the developmental proposal is safe and the risk to adjacent property from geological hazard is not increased is required before construction commences... The letter indicated that any development use or activity undertaken in the shoreline jurisdiction must comply with the requirements of the SMP and be issued applicable permit or letter of exemption. She indicated that the parties must remove the deck within 30 days or submit application conference for a possible permitting options.
15. The appellants responded on March 6, 2006, See Exhibit 22, indicating they did not believe there were code violations and proposing constructive ways of resolving the matter. (Upon the Examiner's review of all the correspondence between the appellant and the City, it is Examiner's belief that there were no constructive ways of resolving the matter offered by the appellant. The appellant was saying he was right and the City should change their mind. That was the sum and substance of his response. The Examiner was disappointed to see that appellant did not consider

perhaps moving the deck to an area outside the jurisdiction of the shoreline environment. From appearances, it would appear that moving what he calls a tree house to the back portion of his property would have avoided most of these issues.) The appellant explained that the structure was a tree house, that it had sentimental value, and a building permit is not required for a tree house. If it were required, they would apply. With reference to the native vegetation zone, they indicated that if the City decides that the house encroaches on the native vegetation zone, they would plant an area equal to the size of the tree house and its ramp with suitable plants behind the bulkhead. The appellant ignores the state's mandate that this vegetative zone within geologically unstable slopes be protected.

16. On March 30, 2006, See Exhibit 23, Megan McKnight responded that while she could empathize with their desire to keep the structure due to sentimental value, she had a duty to comply with Municipal Code and to apply it consistently. She indicated that in order to bring property into compliance with the Code, the structure must be removed or they would need to apply for and obtain a shoreline variance, critical area variance, geotechnical analysis, and building permits for the structure.
17. Appellant requested a review of Megan McKnight's determination. See Exhibit 24. On April 28, 2006, the appellant submitted a shoreline reconnaissance performed by Aspex Consultant which characterized John Peterson's, a geotechnical engineer's, observations. A reconnaissance consists of observations as opposed to analysis. Also submitted was Exhibit 31 from a certified tree pathologist indicating that there was no damage or injury to native vegetation that he could attribute to the presence of the tree house that resides approximately 25 feet above the shore. During the hearing, Dr. Olaf Riberio and Scott Baker, both of whom appear to be highly qualified arborists, differed as to the amount of damage done to the maple tree to which this structure is attached. The Examiner finds that the testimony of Mr. Baker is more credible. The testimony of Dr. Riberio appeared to be slightly biased in favor of the appellants and based upon the testimony of Mr. Baker, the Examiner finds that these trees are more likely than not damaged as a result of attaching this structure to them. The Examiner also finds that it is doubtful that the 2x2 railing would provide much protection to the trees from high winds off the shore.
18. On April 28, 2006 the appellant submitted Exhibit 32, indicating that the structure was a tree house and not a deck. They did not build a deck, they built a tree house of a unique design to insure the safety of their children. They do not believe a tree house is regulated and presume that no permits are required for any of the tree houses that one sees around the island. They offered the geological reconnaissance as proof that they

were not in violation of BIMC 16.20 and that the letter from the plant specialist indicating they were not in violation of native vegetation zone. They indicated that the tree house was not in the zone but above it at a height of 16 feet from the ground and 22 feet from the beach. The appellant indicated that there is no impact on trees to which it is attached or any other plants in the native vegetative zone. The appellant questioned if the City raising these issues was a result of the appellants' participation in city government.

19. On June 1, 2006, the Director of the Department of Planning and Community Development responded indicating that the SMP allows for certain structures to be permitted in the shoreline buffer described as the native vegetation zone. The requirements for these structures are stringent in keeping with the intention of the buffer in accordance with the BIMC 16.12.260(B)(9) "no accessory structures shall be located within the required native vegetation zone, except a stairway to the beach, a tram, a pier or dock, a boathouse, permeable decks less than 30 inches in height above grade, and fences, provided that they all conform to all other city and state requirements including provisions of the Master Program." The structure attached to the trees on your property is not one listed as allowed within the native vegetation zone. The Director sustained the findings of Megan McKnight.
20. On June 15, 2006 at 2:42 p.m. the appellants filed their notice of appeal indicating that (1) BIMC does not control tree houses. Tree houses are not within the scope of the purpose and intent manifest in the language of the Bainbridge Island zoning code. (2) Tree house is not "an accessory structure." (3) The tree house is not "located within the required native vegetation zone". (4) In the alternative, the tree house complies with BIMC because it is a "permeable deck less than 30 inches in height above grade that conforms to all city and state requirements." Mr. Tooloee requested a finding that the notice of violation is invalid and must be dropped, and requested that the case be dismissed.
21. Because of the fact that the appellant is a member of the City Council, this matter was referred to a Pro Tem Hearing Examiner.
22. Subsequent to the hearing, the appellants submitted a Closing Brief which, with photographic attachments that were not submitted during the hearing and are hereby stricken. The Examiner would register concern about children playing on a platform 16 feet high without railings or protective devices. That is up to the appellant, but it does not appear to the Examiner to be safe for the children. The Examiner would note that throughout the hearing process, the structure which was observed by him and of which he viewed photographs, contained deck chairs. During the hearing, the appellant raised issues surrounding many individuals viewing

this deck without any complaints being filed. The fact that this structure was seen by many members of the public and the staff before the complaint was brought to the attention of the officials is not dispositive of any issue. The testimony presented along this line was not helpful to resolving the issues before the Examiner. This structure, by any name, is located within a natural vegetation zone and in a geologically hazardous area as defined by the City Code and is prohibited. This platform is a "piece of work artificially built or composed of parts joined together in some definite manner, whether installed on, above, or below the surface of the ground or water, except for vessels," and is a structure as contemplated by BIMC 16.12.030(176) and for the above reasons, its existence is in violation of various provisions of the BIMC.

23. During his presentation, Mr. Tooloee and his attorney indicated that as they had throughout these proceedings that they felt the appellants were being singled out for special treatment by the staff because of Mr. Tooloee's action as a member of the City Council. Assuming arguendo that this is a true statement, arguing these issues before the Hearing Examiner was not helpful. The issues before the Hearing Examiner were limited as to whether or not the appellants' structure and deck are permitted by the Code. The Examiner would have no jurisdiction over whether or not Mr. Tooloee was singled out for special treatment. Arguments regarding special treatment could only be intimidating to the staff. Based upon the Examiner's observations of the staff and the Examiner's experience over the past many years, there is no evidence that Mr. Tooloee was singled out for special treatment. Staff should be commended for not responding to the barbs about their singling the appellant out for special treatment. The presentation by the City was limited to the fact that Mr. Tooloee had built a structure without complying with any provisions of BIMC. There was no credible evidence of any special treatment by the City against Mr. Tooloee because of his work on the City Council.
24. BIMC 16.12.260(A) provides that all development within the shoreline jurisdiction must comply with the Shoreline Management Act (Chapter 90.58 RCW or its successor) and the Shoreline Master Program (SMP). Individual owner occupied single-family residence and its normal "appurtenances" are exempt from requirement that a Substantial Development Permit be obtained from the local government (WAC 173-14-040 or its successor). BIMC 16.12.260(9) provides that no accessory structures shall be located within the required native vegetative zone, except a stairway to the beach, a tram, a pier or dock, a boat, a permeable deck less than 30 inches in height above grade, and fences; provided that they conform to all other City and State requirements including the provisions of the Master Program. The contractor has labeled this structure as a platform, the observations of the Examiner are that it

appears to be a deck. The appellant calls it a treehouse. Regardless of what it is referred to, it is a structure as defined by the Code and it is located within the native vegetation zone. It does not meet the definitions of any of the qualified exemptions for building an accessory structure in native vegetation zone. Therefore the appellants appear to be in violation of this provision.

25. BIMC 16.12.090 provides in pertinent part that the native vegetation zone is a required vegetation buffer encompassing all uplands in ordinary high water mark to the dimension specified for that particular shoreline environment. Its purpose is to protect and enhance the Island's natural character, water quality, native plant communities, and wildlife habitat along the shoreline.

The native vegetation zone provision applies to all shoreline development, uses and activities, including those which do not require shoreline permit and to existing development. Standards for the native vegetation zone are based on the use category and the environmental designations and are provided in part for environmental designations Table 4.2.

Provisions for native vegetation zone intend that all existing native vegetation within this zone remain unless specifically allowed to be altered or removed. BIMC 16.12.090 provides that "no clearing, grading or construction may be undertaken within the native vegetation zone unless specifically provided for..." In the instant case, there is no provision which allows the construction within the native vegetation zone on this property. The contractor clearly described a construction of this structure which is within this zone. If Mr. Tooloee's a member of the City Council, were permitted to retain this structure within the area of the native vegetative zone, it would set the precedent of allowing similar structures throughout the waterfront area of Bainbridge Island, contrary to the provisions of the SMP.

26. BIMC 16.12.360(A)(1) provides that:

a development, use, or activity shall not be undertaken within the jurisdiction of the Shoreline Management Act... and the Shoreline Master Program unless it is consistent with the policies and procedures of the Shoreline Management Act, applicable state regulations and the Shoreline Master Program.

BIMC 16.12.360(A)(3) provides that "any person looking to undertake substantial development or exempt development on the shoreline shall apply to the director for shoreline permits or statement of exemption." In the instant case, the applicant has applied for neither prior to construction

of this structure. The appellants have the benefit of living on a shoreline of statewide significance. Part of the cost of living in this area is the cost of complying with the regulations designed by the state and the City to protect this fragile environment which has overwhelming demands placed upon it by the general public of the state.

27. As previously stated, the slope on the site is a geologically hazardous area. BIMC 16.20.080 prohibits construction within a 50-foot buffer of the geological hazardous area. Construction within a geologically hazardous area requires a geotechnical analysis and its location requires a variance. The appellant has not applied for a variance. The testimony is uncontroverted. Mr. Michaelson built this platform within a geologically hazardous area. The appellants' seemingly believe that it is up to the contractor to make a determination as to whether or not they have violated these provisions. It is not up to the contractor, it is up to the members of the staff appointed by the public to make these determinations. The testimony is clear
28. The provisions of the Shoreline Master Program clearly provide on Page 115, Section 2, Statement of Exemption: No exempt development, use, or activity shall be taken within the jurisdiction of the shoreline management act (Chapter 90.58 RCW or its successor) and the Master Program unless a statement of exemption has been obtained from the director. Such exemption has not been applied for or granted.
29. Page 114 of the SMP clearly states under Section E(1)(C): "any person wishing to undertake substantial development or exempt development on shorelines shall apply to the director from appropriate shoreline permit or statement of exemption." No such application has been submitted.

Based upon the foregoing findings, the Examiner makes the following conclusions:

**CONCLUSION:**

1. The Hearing Examiner has jurisdiction to hear and decide appeals of the Director's administrative decisions regarding alleged violations and, pursuant to the mandate of BIMC 2.16.130, in making that decision, must give substantial weight to the decision of the department director. See BIMC 2.16.130(F)(2). To overcome the substantial weight accorded the Director, an appellant has to show that the Director's decision is clearly erroneous. Under this standard of review, the Director can be reversed if the Hearing Examiner is left with the definite and firm conviction that a mistake has been made.

2. The appellant has failed to overcome that burden. The appellants have constructed a wooden structure which the Examiner defines as a deck, in the native vegetation zone of the shoreline. The appellants have constructed a wooden structure within a critical area adjacent to a steep, unstable, bank. The appellant has the privilege of owning property which is on a shoreline of statewide significance which according to state law and City Ordinance, is in need of substantial protections to protect the interest of the general public in the shorelines of the state. The provisions of the BIMC are designed to protect the shorelines against adverse effects to the public health, the land and its vegetation, wildlife, and the waters of the state and aquatic life while protecting generally the public rights to navigation. The Bainbridge Island Shoreline Master Program governs all shoreline development, use, and activities. The structure, regardless of its name, is subject to each of the provisions of the Shoreline Management Master Program, the Shoreline Master Program BIMC 16.12, and each of the provisions of the City Code and the state law. The platform is a piece of work artificially built or composed of parts joined together in a definite manner above the surface of the ground. It is a structure which was built in the native vegetation zone, in a geologically hazardous area, and on an unstable slope. Its construction is development which is prohibited. The construction and existence of the structure is in violation of multiple provisions of the BIMC.
  
3. The City's letter of Larry K. Frazier dated June 1, 2006 from which the appellants' appeal is hereby affirmed in all respects. See Exhibit 35. The letter dated March 30, 2006 written by Megan McKnight is hereby affirmed in all respects. The appellant has failed to meet his burden of proof.

**DECISION:**

The appellants' appeal from the Director's Decision of June 1, 2006, is denied and this structure shall be removed forthwith from its current location, perhaps to be relocated with appropriate permits to an area upland of its current location beyond the jurisdiction of the Shoreline Management Act.

**ORDERED** this \_\_\_\_\_ day of December, 2006.

\_\_Signed in original\_\_\_\_\_  
**TERRENCE F. McCARTHY**  
Hearing Examiner