



CITY OF KIRKLAND

City Attorney's Office

123 Fifth Avenue, Kirkland, WA 98033 425.587.3030

www.ci.kirkland.wa.us

MEMORANDUM

To: David Ramsay, City Manager

From: Oskar Rey, Assistant City Attorney

Date: November 6, 2009

Subject: Report to City Council on Waterfront Street End Permits

On August 3, 2009, Randy Altig wrote to the City Council expressing concern about the Waterfront Street End Permits issued by the City for Fourth Street West and Fifth Street West. Staff prepared a draft response letter for the September 1, 2009 Council Meeting (a copy of the staff memo, which includes the Altig letter and draft response, is attached as Exhibit A). At the September 1, 2009 Council Meeting the City Council directed that the response to Mr. Altig not be sent and asked staff to prepare a report that provides the City Council with more information about the waterfront street end permit system. This memo will detail the process by which the waterfront street end permit system was adopted, the reasoning behind it and the parking dispute that subsequently arose. An aerial photograph depicting the location of Fourth Street West and Fifth Street West is attached to this memo as Exhibit B.

I. Background Leading Up to Adoption of Waterfront Street End Permit System.

In 2000 the City Council directed staff to identify unopened waterfront street ends and explore the feasibility of opening them to public use. Staff identified three unopened waterfront street ends: Second Street West, Fourth Street West and Fifth Street West, all of which are in the West of Market neighborhood. Second Street West was identified as a good candidate for opening for public use, in part because it is readily accessible to the public. Staff negotiated with the abutting property owners regarding the removal of encroachments. The Second Avenue West street end was improved and opened to the public in 2003.

In 2001, the City adopted Resolution R-4321 (attached to this Memo as Exhibit C), which implemented policies regarding public access to waterfront street ends. Those policies were based on policies adopted by the City of Seattle, which was also in the process of determining which of its waterfront street ends should be opened to public use. Resolution R-4321 contains evaluation criteria to be used to determine whether public access improvements are appropriate for a particular waterfront street end. The evaluation criteria include: (1) function of the area and compatibility of public use and public access improvement with the predominant waterfront activities and land use patterns in the adjacent areas; (2) compatibility of waterfront street end public use and access with existing and anticipated circulation patterns and pedestrian and vehicular movement; (3) compatibility of waterfront street end public access with adjacent open space and/or pedestrian activity patterns; (4) compatibility of waterfront street end public access with existing topography, physical improvements, surrounding uses, and natural features to provide safe public use; and (5) compatibility with other City adopted policies and plans.

The City Council also directed staff and the Park Board to determine whether Fourth Street West and Fifth Street West should be opened to public use based on the evaluation criteria in Resolution R-4321. The Park Board considered the issue 2003 and recommended, based on the criteria set forth in Resolution R-4321, that the Fourth Street West and Fifth Street West not be opened to public use. That recommendation was transmitted to the City Council in a staff memo dated June 3, 2003, a copy of which is attached to this memo as Exhibit D.

At its October 3, 2003 meeting, the City Council accepted the Park Board recommendation that Fourth Street West and Fifth Street West not be opened for public use. The City Council directed staff to work towards establishment a permit system. Staff reported back to the City Council several times in 2004. The City Council ultimately directed staff to prepare an Ordinance establishing a permit requirement for private use of the street ends.

II. Impediments to Opening the Street Ends to Public Use

There are three theoretically possible ways to access the Fourth Street West and Fifth Street West street ends. All of them present significant logistical or legal problems.

A. Access from "Fifth Avenue West"

Fifth Avenue West (not to be confused with Fifth Street West) is a small access road that provides access to waterfront homes in the area. It extends from Waverly Way and crosses four properties before crossing the Fourth Street West waterfront street end. From there, Fifth Avenue West crosses eight more properties before crossing the Fifth Street West waterfront street end. From there, Fifth Avenue West continues north and terminates just south of Waverly Beach Park. See Exhibit B (aerial photo depicting the area).

Fifth Avenue West is not City right of way and it has not been dedicated to the City. In fact, it is not really a "street" even though it is referred to as "Fifth Avenue West." Rather, it is a road easement that passes over the properties along Lake Washington. Since Fifth Avenue West is not City right of way, the City is not responsible for maintaining it. This means that the City also has less control over how Fifth Avenue West is operated or maintained.

The legal descriptions for some of the properties along Fifth Avenue West state that the Fifth Avenue West road easement is dedicated to the general public. However, other legal descriptions refer to the road easement without mentioning the general public. Still other legal descriptions do not mention the road easement at all.

For quite some time, there have been signs marking Fifth Avenue West as a "private road" where it branches off from Waverly Way. To the extent the public has the right to use Fifth Avenue West, those signs are inaccurate. However, for the reasons that follow, there are obstacles to establishing the right of the public and the City to use Fifth Avenue West.

Burke and Farrar prepared a plat of this area in 1927, but the plat was never recorded. Most of the legal descriptions for the properties listed above make reference to this unrecorded plat and the existing parcels roughly correspond to the lots depicted on the unrecorded plat. The unrecorded plat makes no reference to a Fifth Avenue West road easement and it appears that, based on the plat, access to the parcels would have been from what is now referred to as Waverly Way.¹

¹ Apparently those who prepared the plat did not take into account the steep slope between Waverly Way and Lake Washington.

The fact that some of the legal descriptions for these properties do not mention the road easement does not necessarily mean that there is no easement. In fact, some old assessor's maps show a 20 foot easement crossing all of the properties. Unfortunately, the assessor's maps that I reviewed do not indicate whether the easement is public or private in character.

The Fifth Avenue West road easement likely appears as an exception on title reports for each of the properties listed above. The City, if it wanted to expend the funds and research the matter further, could obtain special title reports for each property over which the Fifth Avenue West road easement passes to determine whether the road easement operates in favor of the public. Such an undertaking would be costly and would not necessarily resolve the access issue on a definitive basis.

It may be difficult, or even impossible, to get actual copies of the old easements. In the course of researching this in 2004, I came across several recording numbers for what appear to be the road easements that comprise Fifth Avenue West. These recording numbers date back to the 1930s and the 1940s. The fact that there are multiple recording numbers spanning a number of years suggests that the Fifth Avenue West road easement was created on a piecemeal basis, and not all at once. These abstracts should provide the essential information about the easements, but are not as complete or reliable as the documents themselves.

It also appears that the paved portion of Fifth Avenue West is, in some cases, not in alignment with the legal description for the Fifth Avenue West road easement. Apparently, in some places the paved portion of the road strays outside the easement entirely. This is a significant issue because it complicates the question of whether a property owner is required to provide access to the public over the paved portion of Fifth Avenue West.

B. Access From Waverly Way or the Water

Fourth Avenue West and Fifth Avenue West extend from Waverly Way to Lake Washington. There are no legal impediments to the City opening the street ends from Waverly Way to Lake Washington. However, the steepness of the slope between Waverly Way and Lake Washington would make access by this route difficult and expensive.

Similarly, public access from the water is theoretically possible, but presents numerous practical difficulties. Given the number of existing alternatives nearby for boaters and kayakers, the City has not given serious consideration to opening the street ends solely for access from the water.

III. Characteristics of the Permits

On September 7, 2004, the City Council adopted Ordinance No. 3958, which established a permit system for the use of Fourth Street West and Fifth Street West (copy attached as Exhibit E). The Ordinance provided for a yearly permit fee of \$625.00 to cover the City's administrative costs of managing the permit system. The City decided on that amount instead of a higher fee because, from a legal standpoint, an abutting property owner has the right to use unopened right of way until such time as the City decides to open the right of way to public use. See, e.g., Nystrand v. O'Malley, 60 Wn.2d 792, 795, 375 P.2d 863 (1962) (landscaping and a bulkhead in an unopened right of way was not inconsistent with the city's rights because the city had made no attempt to open the right of way). For the City, the benefits of the permit system were that it memorialized that the area was right of way and established a procedure by which the City would open the right of way to public use in the future if the City decided to do so.

The legal and practical difficulties of providing access to the street ends was a major factor in the Council's decision to adopt the permit system. After the passage of Ordinance No. 3958, staff began working with the abutting property owners on permits. By June 2005, the City had entered into permits with all four abutting property owners. A copy of one of the permits is attached hereto as Exhibit F.

The permits define "permanent improvements" and "removable improvements" that are in the right of way. Permanent improvements are improvements that the property owner would not be required to remove in the event the City opens the street ends to public use. They are specifically listed in the permit. Permanent improvements include trees, bulkheads, retaining walls and other large items, the removal of which would not be desirable or beneficial with respect to opening the right of way. See Exhibit F, Permit, Section 2 and Attachment B.

Removable improvements are defined as any improvement that is not a permanent improvement. From a practical standpoint, removable improvements will include items such as sheds, fences and certain types of landscaping. In general, removable improvements will be improvements that are not necessary for or conducive to public access to the water. See Exhibit F, Permit, Section 2.

In the event the City elects to open the right of way to provide public access to the water, it will prepare and adopt a "development and use plan" for the right of way. Within 180 days from adoption of the plan, the property owner shall remove all of the removable improvements in the right of way except for any removable improvements that the property owner and the City agree shall stay. See Exhibit F, Permit, Section 7. In the event the property owner fails to remove the removable improvements or fails to comply with other reasonable removal requirements in the City adopted plan, the City may perform the necessary work and seek reimbursement from the property owner. See Exhibit F, Permit, Section 8.

The permits renew automatically every calendar year unless the permits are terminated by the City. The City may terminate the permits by providing 180 days written notice to the property owner. See Exhibit F, Permit, Section 4. The yearly permit fee is \$625.00. See Exhibit F, Permit, Section 5. It should be noted that in setting the amount of the yearly permit fee, the City sought to recoup the costs associated with administering the permit system. The City did not seek to charge more because a property owner already has the right to use unopened rights of way abutting his or her property.

IV. Events After Issuance of the Permits

In 2006, the property owners abutting the Fourth Street West and the Fifth Street West street ends placed "no parking" signs in the area where street ends intersect with Fifth Avenue West. A few individuals objected, stating that they have historically used the area for parking. The complaints focused on the fact that the City issued waterfront street end permits to the property owners who placed the "no parking" signs.

The individuals who objected believe (erroneously, in my view) that the City's issuance of street end use permits enabled the abutting property owners to erect the "no parking" signs. From a legal standpoint, an abutting property owner already has the right to use unopened rights of way until such time as the City opens the right of way for public use. The City established the permit system to memorialize the existence of the right of way and to establish the procedures that would be followed in the event the City decided to open the right of way at some point in the future. However, the issuance of the permits did not fundamentally alter or expand the rights of the abutting property owners to use the unopened right of way.

City staff has treated the dispute over parking as a private civil dispute. From a legal standpoint, the City cannot assert control over the right of way until such time as it decides to open it. From a practical standpoint, the City cannot dictate to the parties how parking in the area should be handled. As a result, the City focused its efforts on encouraging the parties to mediate their dispute.

When the City became aware of the parking dispute in late 2006, it worked towards getting the parties to mediate this dispute through the Bellevue Mediation Program (BMP). It soon became apparent that the parking dispute centered on the Fifth Avenue West street end. In the course of working through these issues, I communicated with both the abutting owners who erected the signs and the individuals who objected to the signs.

The abutting owners stated that they did not have a problem with letting their neighbors use the area for parking so long as they requested permission ahead of time. They use the area for parking themselves and consider it to be part of their property since it is unopened right of way. As such, they have concerns about other people parking their without permission or using the area for long term vehicle storage.

The individuals who object to the "no parking" signs state that they have parked there in the past and believe they have the right to park there without having to request permission. They believe that the "no parking" signs changed the status quo and that issuance of the street end permits precipitated that.

A mediation was held in early 2008 through the Bellevue Mediation Program. Both abutting property owners along Fifth Street West attended. Two property owners along Fifth Avenue West who had concerns about the "no parking" signs attended as well.² I was also in attendance on behalf of the City. While the mediation proceedings are confidential, it seemed to go well. Since that time, the City has not received any complaints about the parking situation except for Mr. Altig's August 3, 2009 letter and his statement at Items from the Audience at the September 1, 2009 Council Meeting.

V. Conclusion and Staff Recommendation

Staff recommends that the City continue with its administration of the waterfront street end permit system. The right of the abutting property owners to regulate parking in the area stems from their status as abutting property owners, and is not the result of the permit system. Since the parking area is unopened right of way, the City is not in a position to regulate who parks there.

As a result, revocation of the permits would not have an impact on the parking dispute. So long as the street ends remain unopened, the City cannot regulate parking in the area. In addition, staff recommends against revocation of the permits because the permits provide for an orderly process by which the street ends can be opened for public use should the City decide to do so in the future. It should also be noted that if the City does open the street ends to public use in the future, the parking in the area by anyone would likely be eliminated.

Staff also recommends that it be authorized to send the draft response letter it prepared for the September 1, 2009 Council Meeting to Mr. Altig (See Exhibit A).

² Mr. Altig does not reside on Fifth Avenue West and did not attend the mediation. However, his mother, who does reside on Fifth Avenue West, was in attendance.



CITY OF KIRKLAND

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123 Fifth Avenue, Kirkland, WA 98033 425.587.3030
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MEMORANDUM

To: David Ramsay, City Manager
From: Oskar Rey, Assistant City Attorney
Date: August 20, 2009
Subject: Draft Response Letter to Randy Altig Regarding Waterfront Street Ends

RECOMMENDATION:

Staff recommends that the Council authorize Mayor Lauinger to sign the attached letter to Randy Altig.

BACKGROUND:

Mr. Altig wrote a letter to the Council dated August 3, 2009, expressing concern about the waterfront street end permits issued by the City for Fourth Street West and Fifth Street West. Mr. Altig also requests that the street ends be opened for public use.

The City Council has previously determined that opening the street ends to public use would not be feasible under the current circumstances. The waterfront street end permits set forth a process by which the street ends could be opened to public use in the future.

There have been disputes over parking in recent years in the area where Fifth Street West intersects Fifth Avenue West. Fifth Avenue West is the existing private road that residents use to access their properties. Fifth Avenue West is not City right of way and Fifth Street West is unopened right of way. As a result, the City is not in a position to regulate parking in that area. The City has encouraged the residents with concerns over parking to resolve their differences through the Bellevue Mediation Program.

EXHIBIT A

Kirkland City Council
123 5th Avenue
Kirkland, WA 98033

Date 8-3-09

Randy Altig
1852 1st Street
Kirkland, WA 98033
425-941-8478

[RECEIVED]

AUG 05 2009

Dear Council Members:

[CITY OF KIRKLAND
CITY MANAGER'S OFFICE]

Many problems have arisen regarding use of the public waterfront street ends on 5th Avenue West because of the decision the City made several years ago to lease the street end properties to private property owners. Unfortunately, the lease decisions have resulted in the loss of unique waterfront access for all Citizens of Kirkland. These city waterfront properties represent one of the most valuable assets that the citizens of Kirkland own. To continue to lease these multi-million dollar properties for \$100.00 a month for the private use of just a few citizens is no longer acceptable.

Over the past 2 years, homeowners on 5th Avenue West have met with Council members and staff to talk about issues facing the street. Council members encouraged neighbors to go to mediation to try and resolve the issues. The result of mediation was that public access and public view access to these waterfront properties was denied by the lessees to the Kirkland Public.

The most disruptive issues are the lessees, who have been allowed to lease the waterfront street end properties for \$100 per month, do not allow residents of the street to park along the properties as has been the custom since the property was developed in the 1900's. In addition they have erected tall fences with 14 foot hedges to block all view and access to the waterfront.

Once both of the 5th Avenue West street ends were leased, the lessees began issuing verbal assaults, along with threatening letters and notes, to anyone parking in the spaces which were once public parking spaces owned and controlled by the City of Kirkland.

The street end properties, which are lake front properties, are rightfully owned by the citizens of Kirkland. This is property which should have been kept open by the City for overflow parking on 5th Avenue West, to be used as turnaround areas for oversized and commercial vehicles, and as waterfront parks for all Kirkland citizens.

The public has been using 5th Avenue West for decades as a pedestrian

pathway to access the two 60 foot lake front street ends and Waverly Park. This history of use has given the public a prescriptive easement of this private street to access these properties. Now these lovely waterfront properties are no longer open to the public.

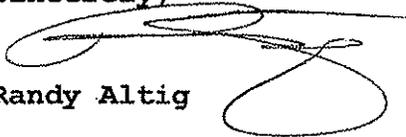
This issue affects all Kirkland citizens. Citizens should be able to enjoy the beauty of these water front properties. All residents of 5th Avenue West should be able to enjoy the properties and to use the public parking again.

The City of Seattle has required that all city owned waterfront street end properties be open to the public.

My request to the Kirkland City Council is to terminate the leases and make these two properties public again by opening them up as two natural, nature parks. These nature parks should be for the enjoyment of all who walk, run, drive, or bike down 5th Avenue West. This should be able to be done with very little money or time commitment on the part of the City as there are many volunteers that are willing to help beautify and maintain these valuable lands. Please consider turning these two waterfront properties into street end parks available for use by all Kirkland citizens, including the residents of 5th Avenue West.

Thank you for listening and I look forward to your reply.

Sincerely,


Randy Altig

November 18, 2009

D R A F T

Randy Altig
1852 First Street
Kirkland, WA 98033

Re: Waterfront Street Ends—Fourth Street West and Fifth Street West

Dear Mr. Altig:

Thank you for your letter to the Kirkland City Council dated August 3, 2009, in which you express concern about the use of the above-referenced waterfront street ends. Several years ago, the City reviewed its unopened waterfront street ends to determine which ones were suitable for opening to public use. The issuance of Right of Way Use Permits for Fourth Street West and Fifth Street West was the result of extensive consideration and deliberation by the City. A summary of process will be helpful in explaining the reasons for issuance of the permits by the City.

In 2003, the City Council asked the Kirkland Park Board to evaluate the possibility of developing unopened waterfront street ends for public access. At that time, Second Street West, Fourth Street West and Fifth Street West were the three remaining unopened waterfront street ends in Kirkland.

At a May 21, 2003, public meeting, the Park Board considered the feasibility of opening the rights of way to public use. After considering the recommendations of City staff and public comments, the Park Board recommended to the City Council that the Second Street West be opened to public use, and that recommendation has since been implemented.

With respect to Fourth Street West and Fifth Street West, it was recommended that the street ends should not be opened for public use. Access problems present the biggest impediment to public use. Fifth Avenue West, which runs roughly parallel to Lake Washington, is the only improved access route to the street ends. However, Fifth Avenue West is a private road and is not City right of way. The City does not control or maintain Fifth Avenue West—the residents do. At least some of the residents have taken the position that the general public is not authorized to use Fifth Avenue West.

The other two possible access points were found to be unsuitable. Both street ends run from Waverly Way down a steep slope to the waterfront. Providing access to the Lake by this method would be very expensive because of the steepness of the bluff. Access from the water by boaters (such as kayaks and canoes) is theoretically possible but potentially dangerous and would not result in enough use to warrant opening the street end.

Thus, the Park Board advised against public use but recommended that the adjoining property owners apply for permits in recognition of the fact that portions of their

Randy Altig
November 18, 2009
page 2

landscaping and improvements are located in the unopened right of way. The City Council considered the Park Board recommendations at several public meetings, and ultimately decided to adopt the current permit system. The permits memorialize the fact that the street ends are City right of way and that the right of way is currently being used by the adjoining property owners. It also sets forth procedures by which the City may open the street ends to public use should it decide to do so in the future.

It is important to note that Fourth Street West and Fifth Street West are "unopened" rights of way. "Unopened" means that the right of way is reserved for public use, but has not been put to use as a street. From a legal standpoint, unopened rights of way may be used by the adjoining property owners until such time as the City opens the right of way to public use. In the City's view, the permits entered into confirm what was already the case: the adjoining property owners have the right to use the unopened street ends until such time as the City decides to open them. The City has decided not to open the street ends as a result of feasibility and cost concerns.

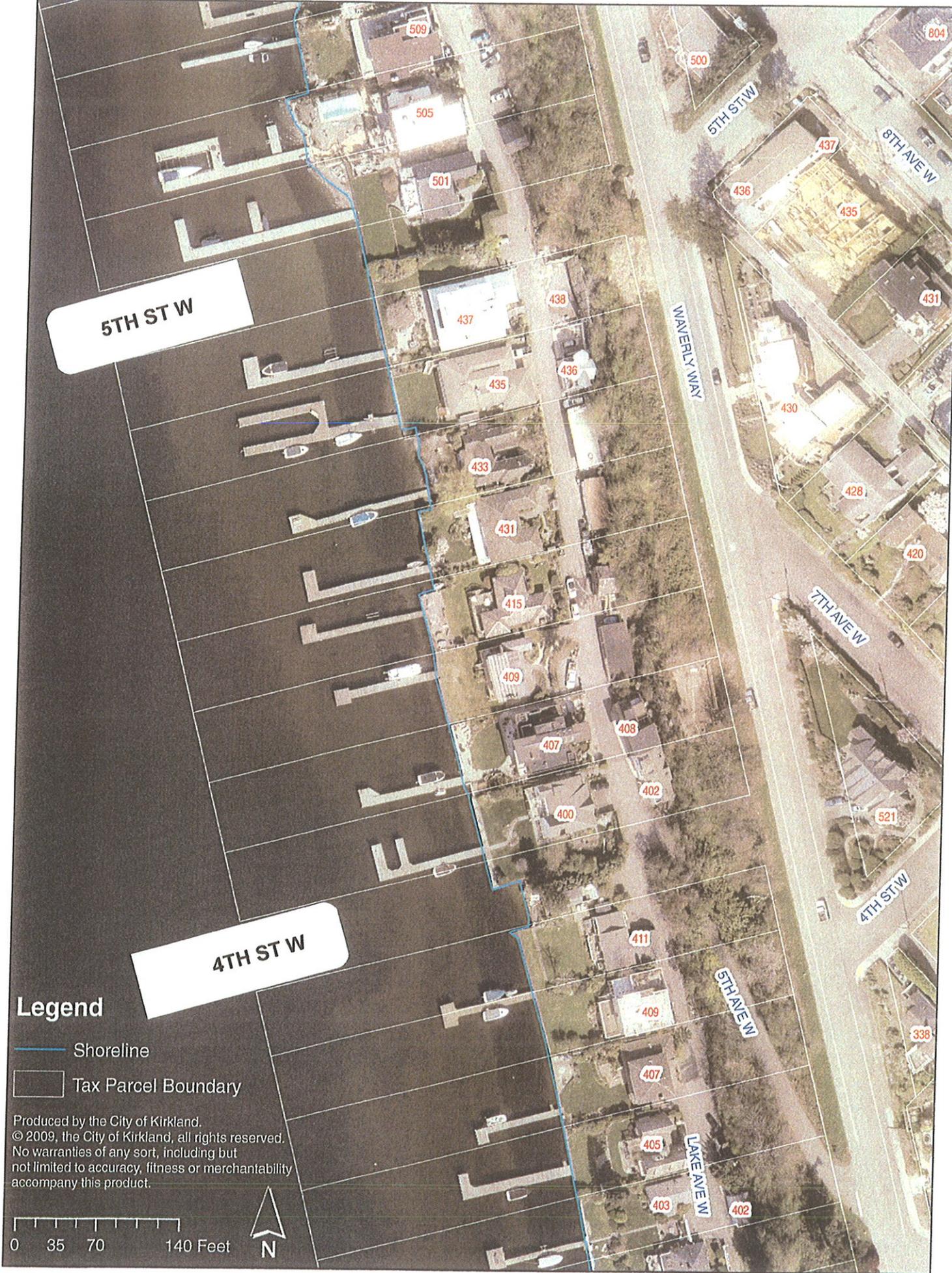
The City realizes that you are concerned about the loss of parking on Fifth Avenue West. The fact that Fifth Avenue West is privately owned is the reason why the City does not regulate parking on Fifth Avenue West. Since Fifth Avenue West is not City right of way and since Fifth Street West is unopened right of way, the City is not in a position to intervene with respect to any disputes over parking. As a result, the City has, in the past, suggested mediation between the affected property owners to resolve the dispute. The City continues to encourage mediation as a possible solution to the parking dispute and will provide whatever support or assistance it can in getting a mediation session set up if the affected property owners are interested in pursuing this option.

The City Council appreciates your concern, and if you would like additional information regarding the mediation program please contact Oskar Rey at (425)587-3030.

Sincerely,
Kirkland City Council

By: James L. Lauinger, Mayor

cc: Daryl Grigsby, Public Works Director
Oskar Rey, Assistant City Attorney



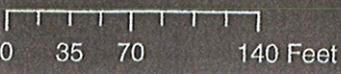
5TH ST W

4TH ST W

Legend

- Shoreline
- Tax Parcel Boundary

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A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND
ADOPTING POLICIES REGARDING THE DEVELOPMENT OF PUBLIC ACCESS
IMPROVEMENTS TO WATERFRONT STREET ENDS.

WHEREAS, waterfront street ends are community assets which, in appropriate circumstances, should be available for public use; and

WHEREAS, the City seeks to develop coordinated waterfront street end policies to ensure the proper use and development of waterfront street ends; and

WHEREAS, the following policies are intended to guide the City in developing appropriate public access improvements on waterfront street ends;

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:

Section 1. The City Council hereby approves and adopts the following policies to guide the City in developing public access improvements on waterfront street ends:

Policy A. Waterfront Street End Preservation. Waterfront street ends shall be preserved as public rights-of-way to allow improvements for public uses and access. All waterfront street ends with public access improvements should be signed to indicate the limits of the public right-of-way.

Policy B. Evaluation Criteria. Proposed public improvements for waterfront street ends shall be permitted only in suitable locations. The following evaluation criteria shall be employed to establish the suitability of a waterfront street end for public use improvements.

1. Function of the area and compatibility of public use and public access improvement with the predominant waterfront activities and land use patterns in the adjacent area.
2. Compatibility of waterfront street end public use and access with existing and anticipated circulation patterns and pedestrian and vehicular movement.
3. Compatibility of waterfront street end public access with adjacent open space and/or pedestrian activity patterns.
4. Compatibility of waterfront street end public access with existing topography, physical improvements, surrounding uses, and natural features to provide safe public use.
5. Compatibility with other City adopted policies and plans.

Policy C. Implementation Procedures. Applications for waterfront street end improvements shall be approved in a manner consistent with

adopted procedures established by the Director of the Department of Parks and Community Services on waterfront street end public access improvements.

Policy D. Private Encroachments. When the City determines that private encroachments on public rights-of-way providing access to water are to be removed, they shall be removed at the expense of the responsible private property owner.

Policy E. Permits for Public Use. Street use permits for public access improvements will be granted following a review process and only for proposals consistent with these policies. Existing street use permits for waterfront street ends will be revoked or modified when a proposed public access improvement is approved, or upon a determination by the City that the use under permit impairs public access to the shore.

Policy F. Permits for Private Uses. Street use permits for private use at waterfront street ends may be granted following a City review process upon a finding that there is not an active application for a street use permit to develop a public access improvement.

Policy G. Fees for Private Use. The City shall charge permit fees for private use of waterfront street ends. The fees shall be based on the value of the abutting private property but shall be adjusted depending on the facts and circumstances of each case, including the nature and the extent of the encroachment and the use to which the waterfront street end is being put.

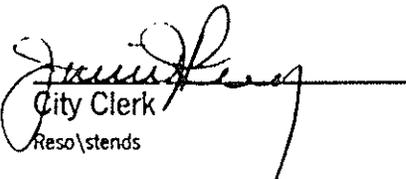
Passed by majority vote of the Kirkland City Council in open meeting this 11th day of December, 2001.

Signed in authentication thereof this 11th day of December, 2001.



MAYOR

Attest:



City Clerk
Reso\stends

CITY OF KIRKLAND

123 FIFTH AVENUE □ KIRKLAND, WASHINGTON 98033-6189 □ (425) 828-1217

**DEPARTMENT OF PARKS AND COMMUNITY SERVICES
MEMORANDUM**

To: Mayor and Members of City Council
From: Barry Russell, Director of Parks and Community Services
Date: June 3, 2003
Subject: Determination of Feasibility of Utilizing the 4th Street West and 5th Street West Street Ends as Public Space.

RECOMMENDATION

That City Council approves the Park Board recommendation that the 4th Street West and 5th Street West Street Ends not be considered for Public Space but rather be considered for Private Use.

That City Council provides direction to staff relative to the type of compensation they would like staff to pursue.

BACKGROUND

At their Park Board meeting of May 21, 2003, the Park Board considered the disposition of the 4th Street West and 5th Street West Street Ends. Staff provided a report that, utilizing the evaluation criteria listed under Policy B of the Street Ends Policy described by Resolution R4321, explained how the circumstances with these street ends either did or did not prove their feasibility as public space.

Attached is a copy of the staff report to the Park Board that offered explanations for each of the five evaluation criteria in Policy B.

A delegation of residents from the local area, headed by their attorney, Mr. Larry Smith, made a presentation at the Park Board meeting. Their interests lie in the two street ends not becoming public spaces. Upon review of the report and an ensuing discussion, the Park Board reached the unanimous decision to recommend that these two street ends not be considered for public space. However, it was also unanimously agreed to that some sort of compensation for the use of these properties for private use should be sought.

Should City Council approve the Park Board recommendation, there are two categories under which compensation may be pursued. In a second attachment, the City Attorney's office explains these two categories and the options offered in each of them.

EXHIBIT D

Once Council reviews the CAO's memorandum, staff would like their direction on which compensation opportunity would be preferred. Staff would then develop a further report providing more specific figures and process.

6A.

CITY OF KIRKLAND

123 FIFTH AVENUE □ KIRKLAND, WASHINGTON 98033-6189 □ (425) 828-1217

**DEPARTMENT OF PARKS AND COMMUNITY SERVICES
MEMORANDUM**

To: Park Board
From: Barn Russell, Director of Parks and Community Services
Date: May 21, 2003
Subject: Street-End Park Development

Staff has been asked to investigate the remaining street ends in the city and report back to City Council on the feasibility and appropriateness of developing them as street-end parks. The two remaining street-ends are located at 4th Street West and 5th Street West. Both are located south of Waverly Way.

The policy, dated December 11, 2001, states that staff, with the assistance of the Park Board, will utilize the evaluation criteria listed under Policy B of the Street Ends Policy described by Resolution R4321 to determine their viability as a publicly accessible street end park. The criteria are as follows:

1. **Function of the area and compatibility of public use and public access improvement with the predominant waterfront activities and land use patterns in the adjacent area.**

The only public access to these facilities would have to be from the water. The only access to the properties from the land side is a private road. Marina Park and Lake Avenue West street-end Park are within close proximity from the southeast. Waverly Beach and Kiwanis Park are a little further to the northwest.

public access but not Row

2. **Compatibility of waterfront street end public use and access with existing and anticipated circulation patterns and pedestrian and vehicular movement.**

There is no public access and there is not anticipated to be any. The private road is a dead end road.

3. **Compatibility of waterfront street end public access with adjacent open space and/or pedestrian activity patterns.**

There is no adjacent open space. The area is a residential neighborhood and the private road discourages pedestrian activity patterns.

4. **Compatibility of waterfront street end public access with existing topography, physical improvements, surrounding uses and natural features to provide safe public access.**

Waverly Way runs parallel to the private road; however, the topography of the area is one of extremely steep and heavily wooded/planted slopes. Accessing both street ends from Waverly would require very steep staircases that would not be ADA accessible.

5. **Compatibility with other City adopted policies and plans.**

The City has a Master Plan for the development of Waverly Park and according to our Level of Service guidelines, do not require additional open space or parks in the area.

It is the opinion of staff that there is no policy reason to pursue the two street end areas as public parks. However, Public Works surveys and aerials show there is substantial encroachment and onsite visits show that this encroachment is entrenched and has been going on for many years. It is staff's opinion that some type of compensation by the adjacent owners should be pursued. A formal agreement recognizing the use of the Public Work easement should be developed and a formal lease, a sale or a property tax assessment should be imposed, as described on Policies F and G of the Resolution.

A copy of the resolution has been attached as well as copies of aerials of the two locations.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND
ADOPTING POLICIES REGARDING THE DEVELOPMENT OF PUBLIC ACCESS
IMPROVEMENTS TO WATERFRONT STREET ENDS.

WHEREAS, waterfront street ends are community assets which, in appropriate circumstances, should be available for public use; and

WHEREAS, the City seeks to develop coordinated waterfront street end policies to ensure the proper use and development of waterfront street ends; and

WHEREAS, the following policies are intended to guide the City in developing appropriate public access improvements on waterfront street ends;

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:

Section 1. The City Council hereby approves and adopts the following policies to guide the City in developing public access improvements on waterfront street ends:

Policy A. Waterfront Street End Preservation. Waterfront street ends shall be preserved as public rights-of-way to allow improvements for public uses and access. All waterfront street ends with public access improvements should be signed to indicate the limits of the public right-of-way.

Policy B. Evaluation Criteria. Proposed public improvements for waterfront street ends shall be permitted only in suitable locations. The following evaluation criteria shall be employed to establish the suitability of a waterfront street end for public use improvements.

1. Function of the area and compatibility of public use and public access improvement with the predominant waterfront activities and land use patterns in the adjacent area.
2. Compatibility of waterfront street end public use and access with existing and anticipated circulation patterns and pedestrian and vehicular movement.
3. Compatibility of waterfront street end public access with adjacent open space and/or pedestrian activity patterns.
4. Compatibility of waterfront street end public access with existing topography, physical improvements, surrounding uses, and natural features to provide safe public use.
5. Compatibility with other City adopted policies and plans.

Policy C. Implementation Procedures. Applications for waterfront street end improvements shall be approved in a manner consistent with

adopted procedures established by the Director of the Department of Parks and Community Services on waterfront street end public access improvements.

Policy D. Private Encroachments. When the City determines that private encroachments on public rights-of-way providing access to water are to be removed, they shall be removed at the expense of the responsible private property owner.

Policy E. Permits for Public Use. Street use permits for public access improvements will be granted following a review process and only for proposals consistent with these policies. Existing street use permits for waterfront street ends will be revoked or modified when a proposed public access improvement is approved, or upon a determination by the City that the use under permit impairs public access to the shore.

Policy F. Permits for Private Uses. Street use permits for private use at waterfront street ends may be granted following a City review process upon a finding that there is not an active application for a street use permit to develop a public access improvement.

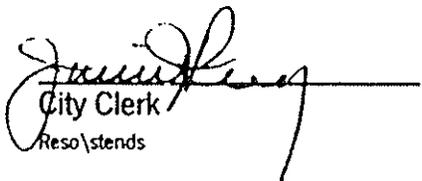
Policy G. Fees for Private Use. The City shall charge permit fees for private use of waterfront street ends. The fees shall be based on the value of the abutting private property but shall be adjusted depending on the facts and circumstances of each case, including the nature and the extent of the encroachment and the use to which the waterfront street end is being put.

Passed by majority vote of the Kirkland City Council in open meeting this 11th day of December, 2001.

Signed in authentication thereof this 11th day of December, 2001.


MAYOR

Attest:


City Clerk
Reso\stends



CITY OF KIRKLAND

City Attorney's Office

123 Fifth Avenue, Kirkland, WA 98033 425.828.7930

www.ci.kirkland.wa.us

MEMORANDUM

To: Barry Russell, Parks Department Director

From: Oskar E. Rey, Special Assistant City Attorney

Date: May 27, 2003

Subject: Waterfront Street Ends

The purpose of this Memo is to explain the restrictions and limitations imposed by state law on vacating or transferring waterfront street ends. My understanding is that on May 21, 2003, the Park Board recommended that unopened waterfront street ends known as Fourth Street West and Fifth Street West not be developed for public use. If the City Council concurs with and adopts the recommendation, the City must decide what to do with the unopened street ends.

One option the City may consider is transferring the right of way to the adjoining property owners. The procedure by which such a transfer would take place is called a "street vacation." When a street is vacated, the abutting owners on each side of the street receive title to the right of way to the center line.

The vacation of waterfront street ends is governed by RCW 35.79.035, a copy of which is attached. That statute imposes significant limitations on the ability of a municipality to vacate a street that abuts a body of water. Vacation of a street abutting a body of water is prohibited unless one of three exceptions set forth in the statute are met. See RCW 35.79.035(1). Only two of the three exceptions are potentially applicable to the street ends in question here.¹

Under RCW 35.79.035(1)(b), the City may, by resolution, declare that a waterfront street end is not presently used for street purposes and is not suitable for any of the following purposes: port, beach or water access, boat moorage, launching sites, park, public view, recreation, or education. Before adopting a resolution vacating a street under this exception, the City must: (1) Compile an inventory of all rights of way abutting the same body of water; (2) Conduct a study determining if the street is suitable for any of the previously listed purposes; (3) Hold a public hearing on the proposed vacation; and (4) Make a finding that the street is not suitable for any of the previously listed purpose and that vacation of the street is in the public interest. See RCW 35.79.035(2).

¹ The other exception provides that a city may vacate a waterfront street end if the vacation is sought to enable the city to acquire the property for beach or water access or park, recreation or educational purposes (among other public purposes). See RCW 35.79.035(1)(a). The City is not considering acquiring outright ownership of the street ends, rendering this exception inapplicable.

In addition, under RCW 35.79.035(1)(c), the City may vacate a waterfront street end if the vacation is part of a plan, adopted by resolution or ordinance, that provides comparable or improved public access to the same shoreline area where the street to be vacated is located.

In all cases under RCW 35.79.035, the vacation of a waterfront street end is not effective until fair market value has been paid for the portions of the street to be vacated. Money received by the City from vacation may only be used in the acquisition of (1) additional beach and water access sites; (2) additional public view sites to a body of water or (3) mooring or launching sites. See RCW 35.79.035(3).

If vacation is infeasible or impractical, the City may establish a permitting program by which abutting property owners may use the right of way adjoining their property in exchange for payment of a periodic permit fee. The City of Seattle sometimes uses such a permitting system and uses a formula based (in part) on the type of use and improvements in the right of way to determine the amount of the fee to be charged.

I hope this memo is helpful in pointing out some of the legal constraints involving vacation of waterfront right of way. If you have any questions, please feel free to give me a call.

ORDINANCE 3958

AN ORDINANCE OF THE CITY OF KIRKLAND RELATING TO PERMITS FOR PRIVATE USE OF WATERFRONT STREET ENDS.

The City Council of the City of Kirkland do ordain as follows:

Section 1. A new Section 19.04.100 is hereby added to Chapter 19.04 of the Kirkland Municipal Code, to read as follows:

19.04.100 Permit for private use of waterfront street end.

(1) Purpose. The City's overall policy with respect to waterfront street ends is that public use is the best use of such street ends. However, in cases where public use is not currently possible or feasible, the City may authorize private use of waterfront street ends by abutting owners through the issuance of permits under this Section.

(2) Definitions.

(a) "Abutting Property" means property abutting a Waterfront Street End.

(b) "Director" means the Director of the Department of Public Works, or his or her designee.

(c) "Waterfront Street End" means the land portion of a right of way that provides, or could provide, the public with visual or physical access to a body of water and its shoreline.

(3) Permit Required. A waterfront street end permit is required for any private use of a waterfront street end in the City of Kirkland. No person shall make private use of a waterfront street end without obtaining a waterfront street end use permit. An abutting property owner is not required to obtain a waterfront street end permit if the abutting property owner removes any improvements or visual or physical barriers to entry that hinder, discourage or prevent access to the waterfront by the public.

(4) Application Requirements. The owner of abutting property shall apply for a waterfront street end use permit on a form to be provided by the Department of Public Works. All applications shall contain all information reasonably requested by the City and a map or diagram depicting the existing conditions of the portion of the waterfront street end being used and any proposed changes to the waterfront street end.

(5) Permit Term. Permits issued under this Section shall have a term of one calendar year beginning with the year 2005.

(6) Permit Fee. The permit fee for the year 2005 shall be \$625.00. In subsequent years, the Director may increase the yearly permit fee in an amount equal to or less than three percent of the yearly permit fee for the previous year.

(7) Permit Conditions. The Director may attach reasonable conditions to a waterfront street end use permit.

(8) Termination of Permit. The City may terminate a waterfront street end permit on 120 days written notice to the abutting property owner. In the event of termination, the abutting owner shall remove any improvements he or she has in the right of way that are inconsistent with the public's ability to use the right of way. The abutting owner shall be responsible for all costs associated with removal of his or her improvements.

(9) Maintenance. The abutting owner shall be responsible for maintaining the portion of the waterfront street end abutting his or her property and any improvements located on the waterfront street end.

Section 2. If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of the ordinance, or the application of the provision to other persons or circumstances is not affected.

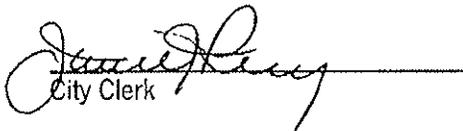
Section 3. This ordinance shall be in force and effect five days from and after its passage by the Kirkland City Council and publication, as required by law.

Passed by majority vote of the Kirkland City Council in open meeting this 7th day of September, 2004.

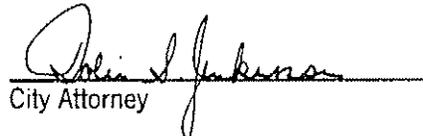
Signed in authentication thereof this 7th day of September, 2004.


MAYOR

Attest:


City Clerk

Approved as to Form:


City Attorney

Return Address:

City of Kirkland
Attn: City Attorney's Office
123 Fifth Avenue
Kirkland, WA 98033

KIRKLAND RIGHT-OF-WAY USE PERMIT FOR WATERFRONT STREET-END

Grantor: City of Kirkland, a Washington municipal corporation
Grantees: 1. Edwards, Glen B. 2. Edwards, Christi L.
Property Legal Description (abbreviated): Lot 1-2, Blk 170, Burke and Farrar's
Kirkland Div #37 unrecorded (Full legal on Attachment "A")
Property Tax Parcel ID No: 1248100105

In consideration of the fees, covenants, conditions and agreements herein contained, the City of Kirkland, a Washington municipal corporation (the "City"), hereby grants to Glen B. Edwards and Christi L. Edwards (the Permittee), a right-of-way use permit (the "Permit") to use and occupy a portion of the unvacated Fourth Street West right-of-way (the "Right-of-Way") situated in the City of Kirkland, King County, Washington. This Permit is subject to the following terms and conditions:

1. **Description of Abutting Property.** The Permittee owns certain real property commonly known as 411 Lake Avenue West, Kirkland, Washington and legally described in Attachment A ("Property").

2. **Improvements.**

2.1 Permanent Improvements. Certain improvements within the Right-of-Way are permanent (the "Permanent Improvements"), the removal of which is neither necessary or desirable. The City and Permittee have identified the Permanent

Improvements and agree that those improvements identified on Attachment B attached hereto are the Permanent Improvements.

2.2 Removable Improvements. Permittee or Permittee's predecessors have constructed or planted landscaping and other improvements within the Right-of-Way that are subject to removal in the event the City elects to terminate this Permit and open the Right of Way to public use (the "Removable Improvements"). All improvements not otherwise designated as Permanent Improvements shall be deemed to be Removable Improvements.

3. **Permit.** The City hereby grants to the Permittee the (i) exclusive control and use of the Right-of-Way, (ii) right to maintain all improvements on the Right-of-Way, and (iii) right to install other improvements which are not permanent (structures), enclosed (structures) or would otherwise require a building or land use permit, including specifically the right to plant landscaping and sprinkler systems to maintain same. All such additional improvements shall become Removable Improvements.

4. **Term.** The term of this Permit shall be for a period of one year commencing on January 1, 2005, provided however, the Permit shall be automatically extended for successive periods of one year unless the City elects to terminate the Permit by providing written notice of termination to Permittee of not less than one hundred and eighty (180) days. The amount of the permit fee shall be prorated if the City terminates this Permit prior to the end of the year and the unused portion of the permit fee shall be paid to the Permittee within thirty (30) days of the date of termination.

5. **Fees.** During the life of the Permit, Permittee shall pay to the City a permit fee of \$625.00 per year. The permit fee for the first year shall be due within ten days of execution of the Permit. Permit fees for subsequent years shall be due on the anniversary date of the execution of this Permit. Pursuant to Ordinance 3958, the City may elect to increase the Permit fee for a subsequent annual period. If the City elects to do so, it shall provide to Permittee notice of the Permit fee increase pursuant to the limitations of Ordinance 3958, not less than one hundred and twenty (120) days prior to the end of any annual period of the Permit.

6. **Agreement to Remove.** In the event the City elects to terminate this Permit for any reason, the Permittee may be required to remove the Removable Improvements not otherwise identified on Attachment B. The City and the Permittee may mutually agree that certain Removable Improvements may remain in place. In no event shall the Permittee be required to remove the Permanent Improvements on the Right-of-Way listed on Attachment B.

7. **Development Plan.** In the event the City elects to terminate the Permit, the City and Permittee agree to act reasonably and in good faith to develop a plan for future development/improvements to the Right-of-Way. The plan will take into account the single family residence use of Permittee's property and surrounding neighborhood. Upon adoption of a specific plan (the "Use Plan") for development/improvements for the Right-of-Way, including (i) a development/improvement plan, (ii) maintenance plan, (iii) hours

of use, and (iv) plan for addressing problems with use, the Permittee shall cause removal, at Permittee's cost and expense, of the Removable Improvements within one hundred and eighty (180) days from notice from the City of its adoption of the Use Plan.

8. City's Remedy if Permittee Fails to Remove. In the event the Permittee has received notice of the Use Plan and for the removal of the Removable Improvements required to be removed pursuant to the Use Plan and such removal is not completed within the one hundred and eighty (180) day period, or removal does not reasonably meet other removal requirements specified in the Use Plan, the City is authorized to do the necessary work or to designate a third party to perform the work. The Permittee shall be responsible for all reasonable costs associated with the performance of such work, including reasonable overhead. The City shall not be responsible for any resulting damage to or destruction of any of the Improvements. Further, the costs of removal shall be a lien against the Property if not paid within sixty (60) days of notice to Permittee of the costs therefore.

9. Maintenance of Improvements. Maintenance of the Right-of-Way, including the Permanent Improvements and Removable Improvements shall be the sole discretion, cost and responsibility of the Permittee.

10. Indemnification. To the extent permitted by law, and except to the extent caused by a negligent act by the City, its officers, agents or employees, or by omission or breach of any term or condition hereof, the City shall not be held liable for any injury (including

death) to any persons or for damage to any property regardless of how such injury or damage may be caused, sustained or alleged to have been sustained by Permittee or by any other as a result of any condition whatsoever related in any way to the Right-of-Way or to the Permittee's use or occupancy of the Right-of-Way. Permittee agrees to defend, hold and save the City harmless from all liability or expense (including expense of litigation which shall include all attorneys fees the City incurs in such litigation) in connection with any such items of actual or alleged injury or damage.

11. Recording Requirement. This Agreement shall be recorded against the Property with the King County Recorder's Office. This Agreement shall run with the land, and therefore bind Permittee, Permittee's heirs, assigns and any subsequent owners of the Property.

12. General Provisions. This Permit contains all of the agreements of the Parties with respect to any matter covered or mentioned in this Permit. No provision of the Permit may be amended or modified except by written agreement signed by the Parties. This Permit shall be binding upon and inure to the benefit of the Parties' successors in interest, heirs and assigns. Any provision of this Permit which is declared invalid or illegal shall in no way affect or invalidate any other provision. In the event either party is required to enforce the terms and conditions of this Permit, the prevailing party shall be entitled to their reasonable attorney's fees and costs. The venue for any dispute related to this Permit shall be King County, Washington. Failure of either party to declare any breach or default immediately upon the occurrence thereof, or delay in taking any action

PERMITEE

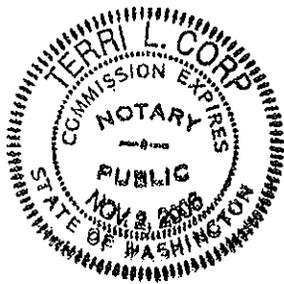
By: Glen B Edwards
Glen Edwards, Owner

By: Christi Edwards
Christi Edwards, Owner

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this day personally appeared before me **Glen B. Edwards and Christi L. Edwards**, to me known to be the individual described in and who executed the within instrument, and on oath swore that she executed the foregoing instrument as her free and voluntary act and deed for the uses and purposes therein mentioned.

GIVEN my hand and official seal this 28 day of June, 2005.



Terri L Corp
Notary Name: Terri L Corp
NOTARY PUBLIC in and for the State of
Washington.
My commission expires: November 2, 2006

ATTACHMENT A

Legal Description of Owner's Property:

Beginning on the Westerly margin of Lake Avenue, now known as "Waverly Way" at a point which bears South $72^{\circ}50'15''$ West 30 feet from the Northwest Corner of Lot 1, Block 11, Town of Kirkland, according to the plat recorded in Volume 6 of Plats, Page 53, in King County, Washington;

Thence along the said Westerly margin South $17^{\circ}09'45''$ East 30.00 feet to the true point of beginning of this description on the Southeasterly margin of 4th Street West (formerly Fleet Street);

Thence continuing South $17^{\circ}09'45''$ East 54.47 feet;

Thence South $72^{\circ}50'15''$ West 444.28 feet, more or less, to a point on the inner harbor line of Lake Washington;

Thence on said inner harbor line North $17^{\circ}22'00''$ West 54.47 feet to the southeasterly margin of 4th Street West; Thence along the said Southeasterly margin North $72^{\circ}50'15''$ East 444.46 feet to the true point of beginning.

Being known as Lot 1 and the Northerly 5 feet of Lot 2, Block 170, Burke and Farrar's Kirkland Addition to the City of Seattle, Division NO. 37, according to the unrecorded plat thereof.

ATTACHMENT B

Description of Permanent Improvements.

Home Owner's Association street light (depicted on diagram);

Paved turnaround (depicted on diagram);

Two birch trees, one pine tree (depicted on diagram)

Lakefront bulkhead (wood and concrete wall along with railroad tie wall) (depicted on diagram)

Attachment B Edwards property

