



CITY OF KIRKLAND

Planning and Community Development Department
123 Fifth Avenue, Kirkland, WA 98033 425.587-3225
www.ci.kirkland.wa.us

MEMORANDUM

To: David Ramsay, City Manager **QUASI-JUDICIAL**

From: Eric Shields, Planning Director
Tony Leavitt, Planner

Date: December 1, 2005

Subject: ROSINSKI REASONABLE USE APPLICATION, ZON05-00016

RECOMMENDATION

Consider the reasonable use application and direct staff to return to the January 3rd, 2006 Council meeting with a resolution to either:

- a. Grant the application as recommended by the Hearing Examiner; or
- b. Modify and grant the application; or
- c. Deny the application.

In the alternative, direct the application be considered at a reopening of the hearing before the Hearing Examiner and specify the issues to be considered at the hearing.

The City Council may, by a vote of at least five members, suspend the rule to vote on the matter at the next meeting and vote on the application at this meeting. A resolution reflecting the recommendation of the Hearing Examiner is enclosed.

RULES FOR CITY COUNCIL CONSIDERATION

The City Council shall consider the reasonable use application based on the record before the Hearing Examiner, the recommendation of the Hearing Examiner, and the applicant's challenge to the recommendation. Process IIB does not provide for testimony and oral arguments. However, the City Council in its discretion may ask questions of the applicant and the staff regarding facts in the record, and may request oral argument on legal issues.

BACKGROUND DISCUSSION

The application is a request for approval of a reasonable use permit to allow construction of one single-family residence on the subject property (see Enclosure 1, Exhibit A). The subject property is adjacent to Forbes Lake and contains a Type I Wetland and associated buffer on a majority of the property. The proposed development would impact approximately 3,600 square feet of the wetland buffer.

The Hearing Examiner conducted a public hearing for the proposed project on September 1, 2004 (see Enclosure 2). At the conclusion of the public hearing, Staff requested that Hearing Examiner give staff additional time to draft a response memo to information submitted by the applicant at the hearing. The Hearing Examiner granted this request and gave staff two weeks to draft a response. The Hearing Examiner also gave the applicant an additional two weeks to submit a response to staff's memo. The Hearing Examiner set September 29th as the response deadline and the close of hearing date.

Based on the record established at the hearing and the testimony by parties at the hearing, the Hearing Examiner recommended denial of the application on October 19th. The applicant filed a challenge to the Hearing Examiner's Recommendation on October 28th (see Enclosure 3).

Additional materials pertaining to this application are available in the official file in the Planning Department.

ENCLOSURES

1. Hearing Examiner Recommendation and Exhibits
2. Hearing Examiner Meeting Minutes- September 1, 2005
3. Applicant's Challenge

**CITY OF KIRKLAND
HEARING EXAMINER FINDINGS,
CONCLUSIONS, AND RECOMMENDATION**

APPLICANT: Charles Rosinski

FILE NO. ZON05-00016

LOCATION: 95xx Slater Avenue NE (see Exhibit A, Attachment 1)

APPLICATION: Request for approval of a reasonable use permit to allow construction of one single-family residence within a wetland buffer (see Exhibit A, Attachment 2). The proposed single-family residence is approximately 3,045 square feet in size and would impact approximately 1,800 square feet of a Type I wetland buffer.

REVIEW PROCESS: Process IIB, Hearing Examiner conducts public hearing and makes recommendation; City Council makes final decision.

SUMMARY OF KEY ISSUES: Compliance with Reasonable Use and General Zoning Code Decisional Criteria (see Exhibit A, Section II.E).

SUMMARY OF RECOMMENDATIONS:

Department of Planning and Community Development: Deny

Hearing Examiner: Deny

PUBLIC HEARING:

After reviewing the official file, which included the Department of Planning and Community Development Advisory Report and after visiting the site, the Hearing Examiner conducted a public hearing on the application. The hearing on the Rosinski application was opened at 7:00 p.m., September 1, 2005, in the Council Chamber, City Hall, 123 Fifth Avenue, Kirkland, Washington, and was closed for oral testimony and legal argument at 7:48 p.m. The hearing was held open administratively until September 30, 2005 to allow the City and the applicant time to submit additional written information into the record. Participants at the public hearing and the exhibits offered and entered are listed in this report. A verbatim recording of the hearing is available in the City Clerk's office. The minutes of the hearing and the exhibits are available for public inspection in the Department of Planning and Community Development.

ENCLOSURE 1

City Council Memo

The following persons spoke at the public hearing:

From the City:

Tony Leavitt, Project Planner

Jeremy McMahon, Planning Supervisor

Staff submitted the staff advisory report (Exhibit A) and gave a PowerPoint presentation (Exhibit B).

From the Applicant:

Charles Rosinski, Applicant

Darrell Mitsunaga, Attorney

Mr. Rosinski reviewed Exhibit C (with attachments).

Mr. Mitsunaga reviewed Exhibit D.

From the Community:

Maxine Keesling

Gwen Anderson

Allison Showalter

Neighboring property owners said they were aware of the wetland regulations and were surprised the applicant wasn't.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

Having considered the entire record in this matter, the Hearing Examiner now makes and enters the following:

FINDINGS AND CONCLUSIONS:

A. Site Description:

1. Site Development and Zoning:

a. Facts:

- (1) Size: 16,500 square feet (.38 acres) according to King County Records.
- (2) Land Use: The subject property is currently vacant.
- (3) Zoning: The subject property is zoned Planned Area (PLA) 17. The PLA 17 zone is considered a Medium Density Zone, however the size of the property only allows for a detached dwelling use.
- (4) Terrain: The subject property has a gradual (approximately 7 percent) slope from the Slater Avenue right-of-way to Forbes Lake. The subject property contains a

Type I Wetland and associated buffer that are located on the east side of the property.

(5) Vegetation: The subject property contains 4 significant trees and a variety of native and nonnative plants, trees and shrubs.

b. Conclusions: Size, terrain, and vegetation as it relates to the existing sensitive area are constraining factors in the consideration of this application. The existing sensitive areas are discussed in Exhibit A, Section II.E and Exhibit E, Attachments 1 & 3.

2. Neighboring Development and Zoning:

a. Facts: The subject property is completely surrounded by Medium Density Residential Zoning (PLA 17 and RM 3.6). A majority of these surrounding properties are developed with single-family homes. A couple of the properties contain multi-family dwelling units.

b. Conclusion: Neighboring development and zoning are not constraining factors in the consideration of this application.

B. Correspondence:

1. Facts: The initial public comment period ran from June 30th, 2005 until July 22nd, 2005. One comment letter was received during this time frame (see Exhibit A, Attachment 4). Below is a summary of the comments in the letter along with staff response:

• Impacts to the Existing Flood Plain

In the letter the Neighbor is concerned that any development within the flood plain will have a negative impact on their property.

Staff Response: The applicant is not proposing any work within the flood plain that was surveyed by the applicant's surveyor (see Exhibit A, Attachment 2).

• Storm Water Retention

The neighbor is worried that storm water runoff will impact their property.

Staff Response: Any development on the subject property is required to comply with standards established in the 1998 King County Surface Water Design Manual.

C. State Environmental Policy Act (SEPA) & Concurrency Review:

The project is Categorically Exempt from SEPA Requirements and as a result is exempt from Concurrency Review.

B. Approval Criteria:

Zoning Code section 90.140 establishes two sets of criteria for the review of Reasonable Use applications. The decision maker must consider both sets of criteria in their determination.

1. REASONABLE USE DETERMINATION CRITERIA**a. Facts:**

- (1) Zoning Code section 90.140 states that the decision maker shall determine whether application of Chapter 90 will deny reasonable use of the property, and whether the proposed use and activities are a reasonable use of the property. In making these determinations, the decision maker shall consider the following three criteria:
 - (a) There is no permitted type of land use for the property with less impact on the sensitive area and the buffer is feasible and reasonable; and
 - (b) No on-site alternative to the proposal is feasible and reasonable, considering possible changes in site layout, reductions in density and similar factors; and
 - (c) The proposal, as conditioned, will result in minimum feasible alteration of or impairment to the functional characteristics of the sensitive areas, and their existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and will not cause significant degradation of groundwater or surface-water quality.
- (2) The applicant has submitted a report prepared by Wetland Resources, a qualified professional, that proposes a mitigation plan for the proposed reasonable use application and describes how the complies with the three decisional criteria above (see Exhibit A, Attachment 5). Additionally, the applicant submitted a letter (Exhibit C) that addressed the reasonable use criteria (and reviewed the chronology of his involvement with the subject property. Also, the applicant's attorneys (Duana Kolouskova & Darrell Mitsuaga) submitted letters that address the above decisional criteria (see Exhibit A, Attachment 6, Exhibit D, and Exhibit F).
- (3) The Watershed Company, the City's wetland consultant, has reviewed the Wetland Resources report and concludes the following in their letter (see Exhibit A, Attachment 7):
 - (a) The applicant is proposing a modest sized home on a highly encumbered lot. A modest yard is also proposed, appearing to be just large enough to accommodate provide maintenance access on the sides and rear of the proposed residence. Overall, the scale of the proposed development is reasonable.
 - (b) Wetland Resources is proposing to remove invasive weeds and install native trees and shrubs in buffer areas that would remain outside of the home and yard portion of the lot. Generally, this is an acceptable approach to mitigate for impacts while still allowing reasonable use of the site. However there are a number of problems with the specific details of the proposed mitigation actions including:

- No fence, barrier or signage is proposed to demarcate the yard area from the buffer mitigation area.
- No description of how the removal all non-native vegetation in the mitigation area will be carried out as stated on the plans.
- The species selection of enhancement plantings is appropriate for this site, but planting densities are incorrectly calculated.
- The tree and shrub area should extend farther east to the wetland boundary and there is room for more trees along the southern site boundary from the edge of the proposed yard all the way to the wetland edge.
- Adjust project, monitoring, and maintenance costs as they are too low or not included.
- Soil amendments should be proposed as the soil on the site appears to be historic fill, as it is gravelly and compacted.
- Installation of a temporary irrigation system to help facilitate vegetation growth.
- A five year maintenance and monitoring schedule is more appropriate for this site.
- Establish a schedule for regular maintenance of the mitigation area.
- Incorporation of woody debris and/or bird nest boxes into the plan would increase buffer function with minimum expense

b. Conclusions:

Staff, with the assistance of The Watershed Company, concluded the following in regards to the proposed application's compliance with the adopted approval criteria:

- (1) The proposed single-family use is the least intensive use that is allowed for the subject property. There is no other permitted type of land use for the property that would have a lesser impact on the wetland and associated buffer.
- (2) Within the amount of wetland and buffer area on the subject property, the proposed location of the single-family residence is feasible and reasonable.
- (3) The proposal, as conditioned with the incorporation of the recommendations made by The Watershed Company, would result in minimum feasible alteration of or impairment to the functional characteristics of the sensitive areas, and their existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and will not cause significant degradation of groundwater or surface-water quality. The applicant has indicated he will comply with the recommendations of The Watershed Company (Exhibit C, page 2).

The Hearing Examiner concurs with the conclusions noted above.

2. REASONABLE USE CONSIDERATION CRITERIA

a. Facts:

- (1) Zoning Code section 90.140 states that in determining whether application of this chapter will deny reasonable use of the property, the decision maker shall consider the following:
 - (a) The inability to derive reasonable use is the result of the applicant's actions, such as segregating or dividing property and creating the undevelopable condition, or taking actions in violation of any local, state, or federal law or regulation; and
 - (b) The land use and environmental regulations, which prevent reasonable use of the property, were in effect at the time of purchase of the property by the applicant.
- (2) The subject property contains approximately 15,790 square feet of land area above the approximate high water line (see Attachment 2). The Type I Wetland occupies nearly half of this total land area. The required 100-foot buffer from the wetland edge occupies a majority of the remaining land area. Approximately 100 square feet of the property's land area is outside of the wetland and buffer.
- (3) The subject property was originally platted as part of the Burke and Farrar's Kirkland Addition to the City of Seattle, Division 14 in July of 1911.
- (4) The current Sensitive Area Regulations (Zoning Code Chapter 90) were adopted in April of 2002.
- (5) According to the Real Estate Excise Tax Affidavit (see Exhibit A, Attachment 8), the applicant purchased the subject property on July 8, 2004 for a total of \$22,000. Attached to this document is a statement sign by Mr. Rosinski that states the following:

This is to certify that at the time of purchase and sale agreement the property was unbuildable. Therefore the sales price is a reflection of that and is our true sales price of \$22,000.00"

Mr. Rosinski testified, wrote in Exhibit C, and declared in Attachment 2 to Exhibit F that he and his ex-wife purchased the subject property in 2000, but did not take possession of the property, pay off the debt on the property and have the transaction recorded until 2004. He also wrote that he was unaware he would need a reasonable use exception until late in the year of 2004. He also testified and wrote that the reason the price of the property was so low was that he had traded another piece of property for a portion of the price, and he certified that it was "unbuildable" when he purchased it because there was no sewer to the property.

Staff has countered that the regulations in effect in 2000 were essentially the same (as they relate to the subject property) as the current regulations found in DZC 90.140, which was adopted in April 2002 (See Exhibit E). Staff noted in Exhibit E (page 3) that a sewer line was installed and completed within the Slater Avenue

right-of-way in late 2003. A letter was sent to Mr. & Mrs. Gosney, property owners of record in January 2004, which stated that a sewer line was extended in front of the property and that the property is subject to a Latecomer's Agreement. Furthermore, a sewer line is depicted on the site plan that was prepared for Mr. Rosinski in December of 2003 (Exhibit A, Attachment 2).

- (6) The applicant's attorneys have argued that Section 90.140 requires that the decision maker "consider" the criteria and not rely solely on Section 90.140.2 as justification for rejection of the reasonable use (See minutes of the hearing, and Exhibits D & F)
- (7) Staff has asked that the Hearing Examiner consider the applicant's constructive and actual knowledge of the regulations and sewer availability at the time of purchase (See Exhibit E).

b. Conclusions

- (1) The subject property was created as part of a recorded plat in July of 1911. As a result, the inability to derive reasonable use is not a result of the applicant's actions.
- (2) The applicant completed the purchase of the subject property in July of 2004, well after the current Sensitive Area Regulations were adopted. The applicant certifies, as part of the Real Estate Excise Tax Affidavit, that the property is unbuildable and the price that the applicant paid for this property reflects this fact. Given the documents in the record the Hearing Examiner finds it incredulous to assume that the applicant and the previous property owner were unaware that the property was encumbered by the current City of Kirkland Sensitive Area Regulations (or previous regulations, which similarly encumbered the subject property), or that they were unaware there was a sewer to the property when the purchase was completed.
- (3) As a result, the Examiner concludes that the proposed reasonable use application should be denied based on the fact that the applicant knew (or as the record shows, clearly should have known) the property was unbuildable when he purchased the property.

3. GENERAL ZONING CODE CRITERIA

- a. Fact: Zoning Code section 152.70.3 states that a Process IIB application may be approved if:
 - (1) It is consistent with all applicable development regulations and, to the extent there is no applicable development regulation, the Comprehensive Plan; and
 - (2) It is consistent with the public health, safety, and welfare.
- b. Conclusion: As fourth in Section II.D.2 of Exhibit A, the application is not consistent with the criteria for approval of the reasonable use application and, therefore the proposal does not comply with the criteria in section 152.70.3. It is not consistent with all applicable development regulations.

C. Comprehensive Plan:

1. Fact: The subject property is located within the North Rose Hill neighborhood. The North Rose Hill Neighborhood Land Use Map designates the subject property for Medium Density Uses (see Exhibit A, Attachment 9).
2. Conclusion: The proposed single-family use is consistent with the Comprehensive Plan for the North Rose Hill Neighborhood.

D. Development Review Committee:

1. Fact: Comments and requirements placed on the project by the Building Department can be found on the Development Standards Sheet, Exhibit A, Attachment 3.
2. Conclusion: If the project were to be approved, the applicant would be required to comply with these comments and requirements as set forth in Exhibit A, Attachment 3.

RECOMMENDATION:

Based upon the foregoing findings of fact and conclusions, denial of this application is recommended. If the City Council adopts different findings and conclusions and approves this application, the Hearing Examiner recommends the conditions set forth in Exhibit A, Attachment 3 be required.

EXHIBITS:

The following exhibits were offered and entered into the record:

- A. Department of Planning and Community Development Staff Advisory Report, with attachments:
 1. Vicinity Map
 2. Development Proposal
 3. Development Standards
 4. Public Comment Letter from Gwen Anderson
 5. Sensitive Area Study for Reasonable Use prepared by Wetland Resources, Inc
 6. Application Letter prepared by Duana Kolouskova
 7. The Watershed Company Review Letter
 8. Copy of Real Estate Excise Tax Affidavit Form
 9. North Rose Hill Neighborhood Land Use Map
- B. PowerPoint Presentation
- C. Hearing presentation of Charles B. Rosinski, with attachments:
 - a. Land purchase proposal for lot 5, dated 7/9/05
 - b. Agreement to sell Real Estate, dated 3/1/01 & 2/28/01
 - c. Agreement to sell Real Estate, dated 3/27/01
 - d. Deed of Trust, recorded 4/17/01
 - e. Letter from Keith & Kimiko Gosney, undated

- f. Letter from Tony Leavitt, dated 12/8/03
 - g. Letter from Charles Rosinski, dated 8/20/04
 - h. Application Form: Zoning Permit – wetland buffer modification
 - i. Letter from Duana Kolouskova, dated 1/12/05
 - j. Letter from Duana Kolouskova, dated 4/28/05, with attachments:
 - 1) Application Form: Zoning Permit – reasonable use
 - 2) Site Plan
 - 3) Legal Description
- D. Letter from Darrell Mitunaga, dated 9/1/05
- E. Memo from Tony Leavitt, Jeremy McMahon, and Robin Jenkinson, dated 9/15/05, with attachments:
 - 1. Wetland Resources Inc. Report, dated 8/20/03
 - 2. Wetland Delineation Review Contract
 - 3. Wetland Delineation Review Letter
 - 4. Ordinance Numbers 3658, 3706, and 3742
 - 5. Slater Avenue NE Sanitary Sewer Latecomer's Assessment Letter
- F. Letter from Duana Kolouskova, dated 9/29/05, with attachments:
 - 1. Declaration of Keith Gosney
 - 2. Declaration of Charles Rosinski

PARTIES OF RECORD:

Charlie Rosinski, PO Box 5000-139, Duvall, WA 98019

Darrell Mitsunaga, Johns Monroe Mitsunaga PLLC, 1500 114th Avenue SE, Suite 102, Bellevue, WA 98052-2812

Duana Kolouskova, Johns Monroe Mitsunaga PLLC, 1500 114th Avenue SE, Suite 102, Bellevue, WA 98052-2812

Gwen Anderson, 9506 Slater Avenue NE, Kirkland, WA 98033

Maxine Keesing, 15241 NE 153rd Street, Woodinville, WA 98072

Allison Showalter, 9252 Slater Avenue NE, Kirkland, WA 98033

City Attorney

Department of Planning and Community Development

Department of Public Works

Department of Building and Fire Services

Entered this 19th day of October 2005, per authority granted by Section 152.70, Ordinance 2740 of the Zoning Code. A final decision on this application will be made by the City Council. My recommendation may be challenged to the City Council within seven (7) working days as specified below.



Ron McConnell, FAICP

Hearing Examiner

CHALLENGES AND JUDICIAL REVIEW

The following is a summary of the deadlines and procedures for challenges. Any person wishing to file or respond to a challenge should contact the Planning Department for further procedural information.

G. CHALLENGE

Section 152.85 of the Zoning Code allows the Hearing Examiner's recommendation to be challenged by the applicant or any person who submitted written or oral comments or testimony to the Hearing Examiner. A party who signed a petition may not challenge unless such party also submitted independent written comments or information. The challenge must be in writing and must be delivered, along with any fees set by ordinance, to the Planning Department by 5:00 p.m., 10/28/05, seven (7) calendar days following distribution of the Hearing Examiner's written recommendation on the application. Within this same time period, the person making the challenge must also mail or personally deliver to the applicant and all other people who submitted comments or testimony to the Hearing Examiner, a copy of the challenge together with notice of the deadline and procedures for responding to the challenge.

Any response to the challenge must be delivered to the Planning Department within seven (7) calendar days after the challenge letter was filed with the Planning Department. Within the same time period, the person making the response must deliver a copy of the response to the applicant and all other people who submitted comments or testimony to the Hearing Examiner.

Proof of such mail or personal delivery must be made by affidavit, available from the Planning Department. The affidavit must be attached to the challenge and response letters, and delivered to the Planning Department. The challenge will be considered by the City Council at the time it acts upon the recommendation of the Hearing Examiner.

H. JUDICIAL REVIEW

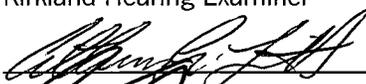
Section 152.110 of the Zoning Code allows the action of the City in granting or denying this zoning permit to be reviewed in King County Superior Court. The petition for review must be filed within twenty-one (21) calendar days of the issuance of the final land use decision by the City.



CITY OF KIRKLAND

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**ADVISORY REPORT
FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS**

To: Kirkland Hearing Examiner
From:  Tony Leavitt, Project Planner
 Eric R. Shields, AICP, Planning Director

Date: August 25, 2005

File: ROSINSKI REASONABLE USE PERMIT (ZON05-00016)

Hearing Date and Place: September 1st, 2005
City Hall Council Chamber
123 Fifth Avenue, Kirkland

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EXHIBIT A
HE Rec. ZON05-00016

I. INTRODUCTION

A. APPLICATION

1. Applicant: Charlie Rosinski, Property Owner
2. Site Location: 95xx Slater Avenue NE (see Attachment 1)
3. Request: A request for approval of a reasonable use permit to allow construction of one single-family residence within a wetland buffer (see Attachment 2). The proposed single family residence is approximately 3,045 square feet in size and would impact approximately 1,800 square feet of a Type I wetland buffer.
4. Review Process: Process IIB, Hearing Examiner conducts public hearing and makes recommendation; City Council makes final decision.
5. Summary of Key Issues and Conclusions:
 - Compliance with Reasonable Use and General Zoning Code Decisional Criteria (see Section II.E).

B. RECOMMENDATIONS

Based on Statements of Fact and Conclusions (Section II), and Attachments in this report, we recommend denial of this application. If the Hearing Examiner adopts different findings and conclusions recommending approval of this application, staff would recommend the conditions of approval set fourth in Attachment 3.

II. FINDINGS OF FACT AND CONCLUSIONS

A. SITE DESCRIPTION

1. Site Development and Zoning:
 - a. Facts:
 - (1) Size: 16,500 square feet (.38 acres) according to King County Records.
 - (2) Land Use: The subject property is currently vacant.
 - (3) Zoning: The subject property is zoned Planned Area (PLA) 17. The PLA 17 zone is considered a Medium Density Zone, however the size of the property only allows for a detached dwelling use.
 - (4) Terrain: The subject property has a gradual (approximately 7 percent) slope from the Slater Avenue right-of-way to Forbes Lake. The subject property contains a Type I Wetland and associated buffer that are located on the east side of the property.
 - (5) Vegetation: The subject property contains 4 significant trees and a variety of native and nonnative plants, trees and shrubs.

b. Conclusions: Size, terrain, and vegetation as it relates to the existing sensitive area are constraining factors in the consideration of this application. The existing sensitive areas are discussed in Section II.E.

2. Neighboring Development and Zoning:

a. Facts: The subject property is completely surrounded by Medium Density Residential Zoning (PLA 17 and RM 3.6). A majority of these surrounding properties are developed with single family homes. A couple of the properties contain multi-family housing units.

b. Conclusion: Neighboring development and zoning are not constraining factors in the consideration of this application.

B. PUBLIC COMMENT

1. Facts: The initial public comment period ran from June 30th, 2005 until July 22nd, 2005. One comment letter was received during this time frame (see Attachment 4). Below is a summary of the comments in the letter along with staff response:

- Impacts to the Existing Flood Plain

In the letter the Neighbor is concerned that any development within the flood plain will have a negative impact on their property.

Staff Response: The applicant is not proposing any work within the flood plain that was surveyed by the applicant's surveyor (see Attachment 2).

- Storm Water Retention

The neighbor is worried that storm water runoff will impact their property.

Staff Response: Any development on the subject property is required to comply with standards established in the 1998 King County Surface Water Design Manual.

C. STATE ENVIRONMENTAL POLICY ACT (SEPA) & CONCURRENCY REVIEW

The project is Categorically Exempt from SEPA Requirements and as a result is exempt from Concurrency Review.

D. APPROVAL CRITERIA

Zoning Code section 90.140 establishes two sets of criteria for the review of Reasonable Use applications. The decision maker must consider both sets of criteria in their determination.

1. REASONABLE USE DETERMINATION CRITERIA

a. Facts:

- (1) Zoning Code section 90.140 states that the decision maker shall determine whether application of Chapter 90 will deny reasonable use of the property, and whether the proposed use and activities are a reasonable use of the property. In making these determinations, the decision maker shall consider the following three criteria:

- (a) There is no permitted type of land use for the property with less impact on the sensitive area and the buffer is feasible and reasonable; and
 - (b) No on-site alternative to the proposal is feasible and reasonable, considering possible changes in site layout, reductions in density and similar factors; and
 - (c) The proposal, as conditioned, will result in minimum feasible alteration of or impairment to the functional characteristics of the sensitive areas, and their existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and will not cause significant degradation of groundwater or surface-water quality.
- (2) The applicant has submitted a report prepared by Wetland Resources, a qualified professional, that proposes a mitigation plan for the proposed reasonable use application and describes how the complies with the three decisional criteria above (see Attachment 5). Additionally the applicant's agent (Duana Kolouskova) has submitted an application letter that addresses the above decisional criteria (see Attachment 6).
- (3) The Watershed Company, the City's wetland consultant, has reviewed the Wetland Resources report and concludes the following in their letter (see Attachment 7):
- (a) The applicant is proposing a modest sized home on a highly encumbered lot. A modest yard is also proposed, appearing to be just large enough to accommodate provide maintenance access on the sides and rear of the proposed residence. Overall, the scale of the proposed development is reasonable.
 - (b) Wetland Resources is proposing to remove invasive weeds and install native trees and shrubs in buffer areas that would remain outside of the home and yard portion of the lot. Generally, this is an acceptable approach to mitigate for impacts while still allowing reasonable use of the site. However there are a number of problems with the specific details of the proposed mitigation actions including:
 - No fence, barrier or signage is proposed to demarcate the yard area from the buffer mitigation area.
 - No description of how the removal all non-native vegetation in the mitigation area will be carried out as stated on the plans.
 - The species selection of enhancement plantings is appropriate for this site, but planting densities are incorrectly calculated.
 - The tree and shrub area should extend farther east to the wetland boundary and there is room for more trees along the southern site boundary from the edge of the proposed yard all the way to the wetland edge.

- Adjust project, monitoring, and maintenance costs as they are too low or not included.
- Soil amendments should be proposed as the soil on the site appears to be historic fill, as it is gravelly and compacted.
- Installation of a temporary irrigation system to help facilitate vegetation growth.
- A five year maintenance and monitoring schedule is more appropriate for this site.
- Establish a schedule for regular maintenance of the mitigation area.
- Incorporation of woody debris and/or bird nest boxes into the plan would increase buffer function with minimum expense

b. Conclusions:

Staff, with the assistance of The Watershed Company, concludes the following in regards to the proposed application's compliance with the established approval criteria:

- (1) The proposed single family use is the least intensive use that is allowed for the subject property. There is no other permitted type of land use for the property that would have a lesser impact on the wetland and associated buffer.
- (2) Within the amount of wetland and buffer area on the subject property, the proposed location of the single family residence is feasible and reasonable.
- (3) The proposal, as conditioned with the incorporation of the recommendations made by The Watershed Company, would result in minimum feasible alteration of or impairment to the functional characteristics of the sensitive areas, and their existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and will not cause significant degradation of groundwater or surface-water quality.

2. REASONABLE USE CONSIDERATION CRITERIA

a. Facts:

- (1) Zoning Code section 90.140 states that in determining whether application of this chapter will deny reasonable use of the property, the decision maker shall consider the following:
 - (a) The inability to derive reasonable use is the result of the applicant's actions, such as segregating or dividing property and creating the undevelopable condition, or taking actions in violation of any local, state, or federal law or regulation; and

- (b) The land use and environmental regulations which prevent reasonable use of the property were in effect at the time of purchase of the property by the applicant.
- (2) The subject property contains approximately 15,790 square feet of land area above the approximate high water line (see Attachment 2). The Type I Wetland occupies nearly half of this total land area. The required 100 foot buffer from the wetland edge occupies a majority of the remaining land area. Approximately 100 square feet of the property's land area is outside of the wetland and buffer.
- (3) The subject property was originally platted as part of the Burke and Farrar's Kirkland Addition to the City of Seattle, Division 14 in July of 1911.
- (4) The current Sensitive Area Regulations (Zoning Code Chapter 90) were adopted in April of 2002.
- (5) According to the Real Estate Excise Tax Affidavit (see Attachment 8), the applicant purchased the subject property on July 8, 2004 for a total of \$22,000. Attached to this document is a statement sign by Mr. Rosinski that states the following:

This is to certify that at the time of purchase and sale agreement the property was unbuildable. Therefore the sales price is a reflection of that and is our true sales price of \$22,000.00"

b. Conclusions

- (1) The subject property was created as part of a recorded plat in July of 1911. As a result, the inability to derive reasonable use is not a result of the applicant's actions.
- (2) The applicant purchased the subject property in July of 2004, well after the current Sensitive Area Regulations were adopted. The applicant certifies, as part of the Real Estate Excise Tax Affidavit, that the property is unbuildable and the price that the applicant paid for this property reflects this fact. Staff assumes that the applicant and the previous property owner were aware that the property was encumbered by the current City of Kirkland Sensitive Area Regulations.
- (3) As a result, Staff concludes that the proposed reasonable use application should be denied based on the fact that the applicant knew the property was unbuildable when he purchased the property.

3. GENERAL ZONING CODE CRITERIA

a. Fact: Zoning Code section 152.70.3 states that a Process IIB application may be approved if:

- (1) It is consistent with all applicable development regulations and, to the extent there is no applicable development regulation, the Comprehensive Plan; and
- (2) It is consistent with the public health, safety, and welfare.

- b. Conclusion: As fourth in Section II.D.2 of this report, the application is not consistent with the criteria for approval of the reasonable use application and therefore the proposal does not comply with the criteria in section 152.70.3. It is not consistent with all applicable development regulations.

E. COMPREHENSIVE PLAN

1. Fact: The subject property is located within the North Rose Hill neighborhood. The North Rose Hill Neighborhood Land Use Map designates the subject property for Medium Density Uses (see Attachment 9).
2. Conclusion: The proposed single family use is consistent with the Comprehensive Plan for the North Rose Hill Neighborhood.

F. DEVELOPMENT REVIEW COMMITTEE

1. Fact: Comments and requirements placed on the project by the Building Department can be found on the Development Standards Sheet, Attachment 3.
2. Conclusion: If the project were to be approved, the applicant would be required to comply with these comments and requirements as set forth in Attachment 3.

III. CHALLENGES AND JUDICIAL REVIEW

The following is a summary of the deadlines and procedures for challenges. Any person wishing to file or respond to a challenge should contact the Planning Department for further procedural information.

A. CHALLENGE

Section 152.85 of the Zoning Code allows the Hearing Examiner's recommendation to be challenged by the applicant or any person who submitted written or oral comments or testimony to the Hearing Examiner. A party who signed a petition may not challenge unless such party also submitted independent written comments or information. The challenge must be in writing and must be delivered, along with any fees set by ordinance, to the Planning Department by 5:00 p.m., _____, seven (7) calendar days following distribution of the Hearing Examiner's written recommendation on the application. Within this same time period, the person making the challenge must also mail or personally deliver to the applicant and all other people who submitted comments or testimony to the Hearing Examiner, a copy of the challenge together with notice of the deadline and procedures for responding to the challenge.

Any response to the challenge must be delivered to the Planning Department within seven (7) calendar days after the challenge letter was filed with the Planning Department. Within the same time period, the person making the response must deliver a copy of the response to the applicant and all other people who submitted comments or testimony to the Hearing Examiner.

Proof of such mail or personal delivery must be made by affidavit, available from the Planning Department. The affidavit must be attached to the challenge and response letters, and delivered to the Planning Department. The challenge will be considered by the City Council at the time it acts upon the recommendation of the Hearing Examiner.

B. JUDICIAL REVIEW

Section 152.110 of the Zoning Code allows the action of the City in granting or denying this zoning permit to be reviewed in King County Superior Court. The petition for review must be filed within twenty-one (21) calendar days of the issuance of the final land use decision by the City.

IV. APPENDICES

Attachments 1 through 9 are attached.

1. Vicinity Map
2. Development Proposal
3. Development Standards
4. Public Comment Letter from Gwen Anderson
5. Sensitive Area Study for Reasonable Use prepared by Wetland Resources, Inc
6. Application Letter prepared by Duana Kolouskova
7. The Watershed Company Review Letter
8. Copy of Real Estate Excise Tax Affidavit Form
9. North Rose Hill Neighborhood Land Use Map

V. PARTIES OF RECORD

Applicant: Charlie Rosinski, PO Box 5000-139, Duvall, WA 98019

Applicant's Agent: Duana Kolouskova, Johns Monroe Mitsunaga PLLC, 1500 114th Avenue SE, Suite 102,
Bellevue, WA 98052-2812

Party of Record: Gwen Anderson, 9506 Slater Avenue NE, Kirkland, WA 98033

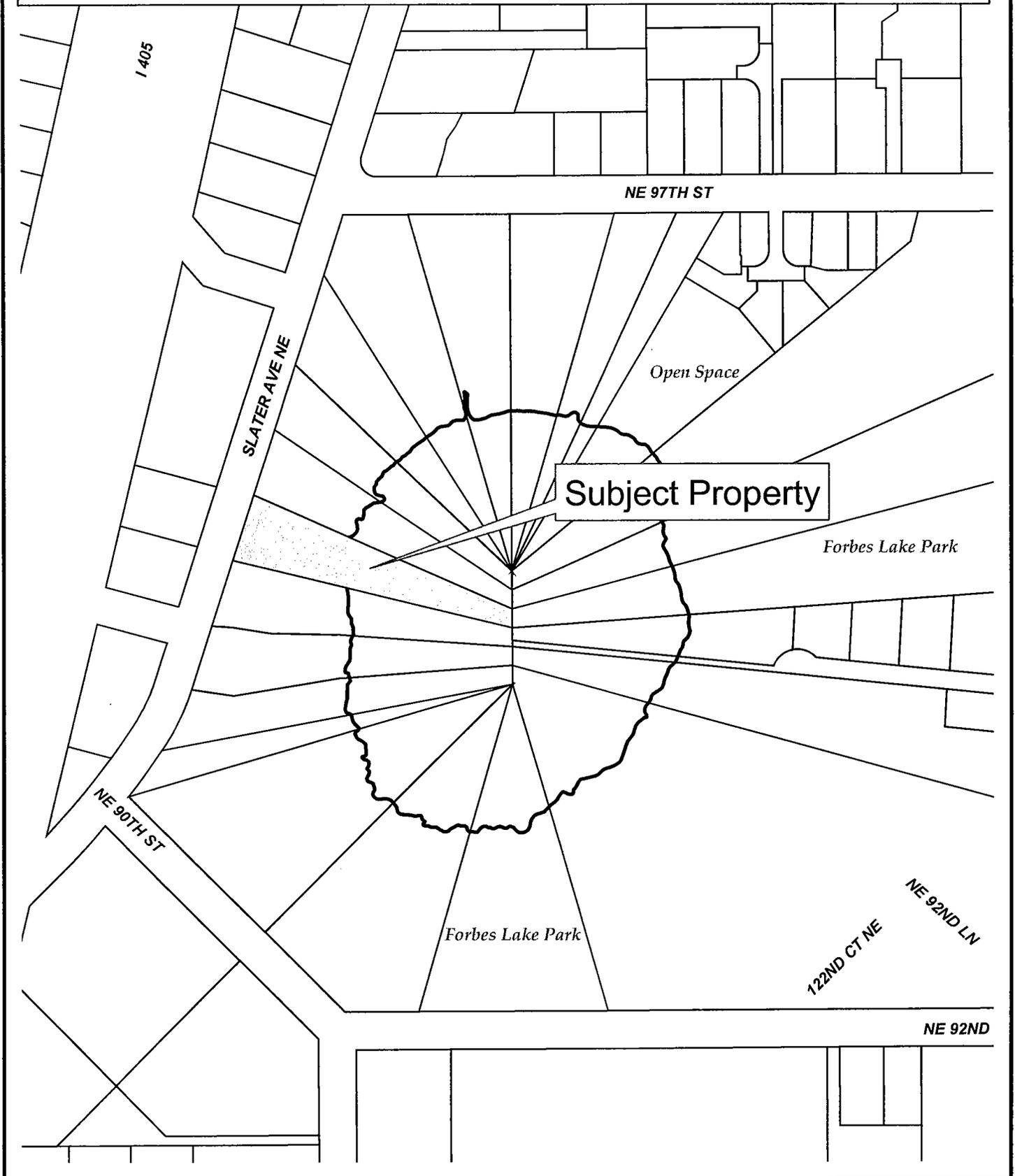
Department of Planning and Community Development

Department of Public Works

Department of Building and Fire Services

A written recommendation will be issued by the Hearing Examiner within eight calendar days of the date of the open record hearing.

Rosinski Reasonable Use Permit (ZON05-00016)



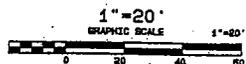
Subject Property

Open Space

Forbes Lake Park

Forbes Lake Park

ATTACHMENT	<u>1</u>
<u>ZON05.00016</u>	



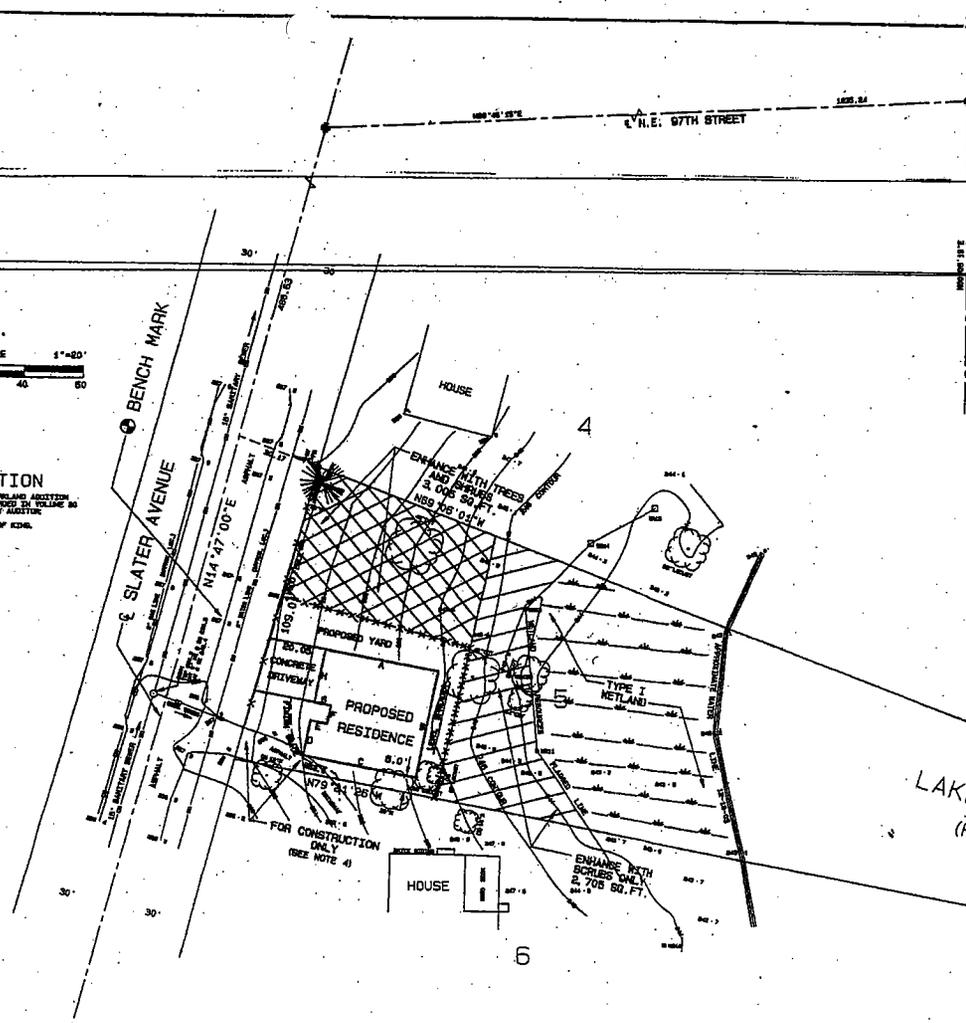
LEGAL DESCRIPTION

LOT 2, BLOCK 43 OF BUNKER HILL PARKWAY RETAILING ACQUISITION TO THE CITY OF DUVALL, AS PER PLAT RECORDED IN PLATE NO. OF PLATE 7486 54, RECORD OF LAND COUNTY AUDITOR, STRATA IN THE CITY OF KIRKLAND, COUNTY OF KING, STATE OF WASHINGTON.

LEGEND

- MR - METLAND RESOURCES FLAG
- COT - COTTAGEWOOD
- FK - FIRE HYDRANT
- WV - WATER VALVE
- EXISTING GRADE
- PROPOSED GRADE
- STRUCTURE FOOTPRINT
- SETBACK LINE

- METLAND
- BUFFER ENHANCEMENT (TREES AND SHRUBS)
- BUFFER ENHANCEMENT (SHRUBS ONLY)
- XXXXXXXXX PROPOSED BUFFER EDGE



NOTES

1. EASEMENTS, IF EXISTING, ARE NOT SHOWN ON THIS PLAN.
2. THE TOPOGRAPHY IS BASED ON THE CITY OF KIRKLAND REPORT ENTITLED "FORBES LAKE DRAINAGE BASIN ANALYSIS FOR LAKE KIRKLAND PARK", A CONSULTING PROJECT LOCATED ON THE NORTHEAST SIDE OF FORBES LAKE. THE REPORT WAS PREPARED BY HANSEN & ASSOCIATES, A CIVIL ENGINEERING AND LAND SURVEYING FIRM ON OCTOBER 26, 1994. THE REPORT LISTS THE 100 YEAR BOTTOM ELEVATION FOR FULLY DEVELOPED CONDITIONS ALONG FORBES LAKE TO BE ELEVATION 245.25. HANSEN CONSULTANTS HAS CONDUCTED A TOPOGRAPHIC SURVEY OF THE SUBJECT PROPERTY USING THE BENCHMARK USED BY HANSEN & ASSOCIATES TO CONDUCT THE DRAINAGE ANALYSIS. THE 245.25 CONTOUR HAS BEEN USED AS THE 100 YEAR STORM ELEVATION FOR FULLY DEVELOPED CONDITIONS TO COMPUTE THE AREA OF THE SUBJECT PROPERTY ABOVE THE 100 YEAR FULLY DEVELOPED STORM ELEVATION. THE AREA WAS COMPUTED TO BE 7932 SQUARE FEET.
3. DOWNSPOUTS TO "LEVEL SPREADER" AT REAR OF HOUSE.
4. THE PORTION OF THE EXISTING ASPHALT DRIVE WITHIN THE ROSINSKI PROPERTY WILL BE REMOVED AT THE END OF CONSTRUCTION. THE NEIGHBOR TO THE SOUTH WILL RELOCATE THE DRIVEWAY ON LOT 6 (PROPERTY TO THE SOUTH).

WALL SEGMENT	WALL LENGTH	MIDPOINT ELEVATION	PRODUCT
A	40'	251.00	10,040.00
B	39'	248.25	9,881.75
C	40'	252.00	10,080.00
D	22.8'	253.75	5,785.50
E	6'	253.45	1,520.70
F	6.5'	253.00	1,644.25
G	6'	253.45	1,520.70
H	10.50'	253.75	2,664.38

TOTALS: 170.00 42,734.41

AVERAGE EXG GRADE = TOTAL PRODUCTS/TOTAL WALL LENGTH:

MAX. HT. ALLOWABLE: 251.98 EXG. GRADE
 MAX ELEVATION: 252.00
 PROPOSED RIDGE ELEVATION: 278.37
 PROPOSED RIDGE: 278.28 0.1 BELOW HT. LIMIT

IMPERVIOUS LOT COVERAGE: 160% MAX

LOT AREA (SEE NOTE 2): 7932 S.F.
 PROPOSED COVERAGE:
 BLDG. AREA (ROOF): 2068 S.F.
 DRIVE/WALK/PATIOS: 800 S.F.
 TOTAL COVERAGE: 2868 S.F.

LOT COVERAGE = LOT COVERAGE/LOT AREA: 34%

OWNER

CHARLES ROSINSKI
 P.O. BOX 5000-139
 DUVALL, WA 98019
 425 344-2763 (MOBILE)
 360 794-0876 (OFFICE)

FLOOR AREA RATIO

LOT AREA 7932 SQ. FT.
 MAIN FLOOR 1237 SQ. FT.
 UPPER FLOOR 1419 SQ. FT.
 GARAGE 389 SQ. FT.
 TOTAL FLOOR AREA=3045 SQ. FT.
 PERCENT COVERAGE=38%

BENCHMARK

TOP OF IR. NAIL AND END OF IR. ASPHALT
 5/16" DIA. IR. NAIL ON ELEVATION OF
 245.25' IN NORTH OF TOWN MAPS, SEC. 245.24(1)
 1/4" DIA. IR. NAIL ON 10TH STREET
 1/4" DIA. IR. NAIL ON 10TH STREET
 1/4" DIA. IR. NAIL ON 10TH STREET

ATTACHMENT 2

ZONOS. 00016

**CHARLES ROSINSKI
 CRC CONSULTING**

P.O. BOX 5000-139
 DUVALL, WA 98019

OFFICE (360) 794-0876
 MOBILE (425) 344-2763
 FAX (360) 909-9546

SITE PLAN

RESIDENCE FOR
 CHARLES ROSINSKI

REV. NO. 0001
 DATE 10/10/01
 DRAWN BY J.L. BROWN
 CHECKED BY J.L. BROWN
 APPROVED BY J.L. BROWN

1

REV. NO.	DRWN BY	REVISIONS	DATE	APPROVAL



DEVELOPMENT STANDARDS LIST

File: Rosinski Reasonable Use Application, ZON05-00016

In addition to the following zoning code requirements, the applicant shall be required to comply with all conditions set fourth in Attachment 7 of the Staff Advisory Report.

85.25.1 Geotechnical Report Recommendations. The geotechnical recommendations contained in the report by Geotech Consultants dated December 30, 2003 shall be implemented.

90.45 Wetlands and Wetland Buffers. No land surface modification may take place and no improvement may be located in a wetland or within the environmentally sensitive area buffers for a wetland, except as specifically provided in this Section.

90.50 Wetland Buffer Fence. Prior to development, the applicant shall install a six-foot high construction phase fence along the upland boundary of the wetland buffer with silt screen fabric installed per City standard. The fence shall remain upright in the approved location for the duration of development activities. Upon project completion, the applicant shall install between the upland boundary of all wetland buffers and the developed portion of the site, either 1) a permanent 3 to 4 foot tall split rail fence, or 2) permanent planting of equal barrier value.

90.125 Frequently Flooded Areas. No land surface modification may take place and no improvements may be located in a frequently flooded area, except as specifically provided in Chapter 21.56 of the Kirkland Municipal Code.

90.150 Natural Greenbelt Protective Easement. The applicant shall submit for recording a natural greenbelt protective easement over the wetland and buffer area, in a form acceptable to the City Attorney, for recording with King County.

90.145 Performance Security. The City will require a security to ensure compliance with any aspect of the Drainage Basins chapter or any decision or determination made under this chapter. A bond is required for monitoring and maintenance of the plants required as part of the mitigation plan(see Attachment 7). Additional requirements can be found in KZC section 90.145

90.155 Liability. The applicant shall enter into an agreement with the City which runs with the property, in a form acceptable to the City Attorney, indemnifying the City for any damage resulting from development activity on the subject property which is related to the physical condition of the stream, minor lake, or wetland.

95.15.4 Tree Protection Techniques. In order to provide the best possible conditions for the retention of significant trees, the applicant shall construct a temporary but immovable 4 foot high chain-link fence generally corresponding to the drip line of each tree on the subject property. Additional tree protection measures may be required of the applicant. The protective fencing must remain in place throughout the demolition, clearing, grading, excavation, and construction processes, including the construction of homes. No grading, operation of heavy equipment, stockpiling, or excavation may occur inside the protective fences.

CITY OF KIRKLAND
123 FIFTH AVENUE, KIRKLAND, WASHINGTON 98033-6189 (425) 587-3225

Date: 8/25/2005

DEVELOPMENT STANDARDS

CASE NO.: ZON05-00016

PCD FILE NO.: ZON05-00016

BUILDING DEPARTMENT CONDITIONS

Buildings must comply with 2003 editions of the International Residential, Building, Mechanical, and Fire Codes and the 2003 Uniform Plumbing Code as adopted and amended by the State of Washington and the City of Kirkland.

Structure must comply with Washington State Energy Code (WAC 51-11); and the Washington State Ventilation and Indoor Air Quality Code (WAC 51-13).

Structures must be designed for seismic design category D, wind speed of 85 miles per hour and exposure B.

VIA EMAIL TO TLEAVITT@CI.KIRKLAND.WA.US

July 21, 2005

Tony Leavitt
Project Planner
City of Kirkland
123 5th Ave.
Kirkland, WA 98033

RE: NOTICE OF APPLICATION
ROSINSKI REASONABLE USE EXCEPTION
FILE NO. ZON05-00016
Location 95XX Slater Avenue NE

Dear Mr. Leavitt:

This letter is intended to express my concerns about the Application for a Reasonable Use Exception for Mr. Rosinski – File No. ZON05-00016. My name is Gwen Anderson and I own the property at 9506 Slater Ave. NE, which borders Mr. Rosinski's lot on its south side. While I own the house and land at 9506 Slater Ave. NE, it is occupied by my elderly parents Harris and Kay Anderson.

My first concern relates to the possibility of flooding on my property at 9506 as a result of the elimination of the wetland vegetation on Mr. Rosinski's lot. Mr. Rosinski's lot has a very different wetland demarcation and buffer setback location from my property; his boundaries exist much further to the West than mine. Mr. Rosinski's eastern property line at the edge of Forbes Lake terminates at a point directly in front of the home I own at 9506. During the nine "wet" months of the year, the area of Mr. Rosinski's lot that borders my lot is under water. If he clears the enormous trees that are at the center of his lot and the massive hedge of native Spiraea (approximately 40 feet in length and too dense to measure the width), near the south boundary of his lot, I fear the water floodplain that exists today will be dramatically increased to the south and will negatively impact the stability of my lot.

The impact of this increase in the floodplain would alter the location of my wetland demarcation and thus the buffer boundary that exists today. This limits my opportunities for improving my property and may actually cause the location of my home to become non-compliant as the demarcation moves. The home at 9506 Slater was built in compliance with the current boundaries as they exist today. Ultimately, this could negatively impact the value of my property.

Is Mr. Rosinski being required to build a retention pond on the lot to accommodate the additional runoff that will occur as a result of reduction in vegetation? If so, will he be required to grade the property to ensure that the water flows into such a retention pond? Is he being required to build a non-standard house that will be responsive to the wetland environment? It is my understanding that currently his lot doesn't have enough land outside the buffer zone to allow him to build a home. It would be wrong to negatively impact neighboring properties in order to provide an exception to Mr. Rosinski. Further, it is also my understanding that Mr. Rosinski does not plan to live in the home he wants to build, but rather wants to build it and sell it as an investment. I know this because I had my Real Estate Agent contact him to attempt to buy the property. I had hoped to preserve it in its natural state. Mr. Rosinski informed my Agent that he was planning on developing and selling the property.

ATTACHMENT 4

ZON05-00016

Pursuant to Section 90 of the City of Kirkland Zoning Code, Chapter 90-140, Item 3, the proposal for Reasonable Use “*will result in minimum feasible alteration of or impairment to the functional characteristics of the sensitive areas, and their existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and will not cause significant degradation of groundwater or surface-water quality.*” I believe there is a great potential to have this Reasonable Use Exception result in huge alterations to the functional characteristics of his lot and neighboring parcels.

Also Pursuant to Section 90 of the City of Kirkland Zoning Code, Chapter 90-140, the following criteria shall be observed in making a decision.

“In determining whether application of this chapter will deny reasonable use of the property, the decision maker shall consider the following:

- 1. The inability to derive reasonable use is the result of the applicant’s actions, such as segregating or dividing property and creating the undevelopable condition, **or taking actions in violation of any local, state, or federal law or regulation;***

I believe the Planning Department should note that Mr. Rosinski originally attempted to develop this lot on a sensitive wetland area without ever procuring any permits from the City of Kirkland to do so. A Cease and Desist order had to be put in place by the City in order to stop the work that had commenced on the property. He had already bulldozed a large portion of the lot and had begun to the process of building a structure.

Mr. Leavitt, I want to thank you in advance for your consideration of my concerns. I am available to discuss them should you have any questions. I can be reached on my cell phone at any time at 206-915-5432.

Sincerely,

Gwen Anderson
Owner, 9506 Slater Ave. NE, Kirkland, WA 98033

cc: Harris Anderson
Kathryn Anderson



Delineation / Mitigation / Restoration / Habitat Creation / Permit Assistance

9505 19th Avenue S.E.
Suite 106
Everett, Washington 98208
(425) 337-3174
Fax (425) 337-3045

**SENSITIVE AREA STUDY
FOR
REASONABLE USE**

ROSINSKI - LOT 5/SLATER AVENUE

Wetland Resources, Inc. Project #03198

Prepared By:

Wetland Resources, Inc.
9505 19th Ave. SE, Suite 106
Everett, WA 98208
(425) 337-3174

For:

Charles Rosinski
19916 Old Owen Rd.; Suite 211
Monroe, WA 98272

August 20, 2003
Revision #1: April 28, 2005

ATTACHMENT 5

2005-00016

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SITE DESCRIPTION

Wetland Resources, Inc. conducted a wetland delineation on the subject property in July of 2003. The subject site encompasses approximately 0.7 acres, lying southeast of the intersection of Slater Avenue NE and NE 97th Street in the city of Kirkland, Washington (Section 4, Township 25N, Range 5E, W.M.).

Residential lots surround the subject property to the south and north, and Slater Avenue NE borders the property on the west. A portion of Forbes Lake covers the eastern half of the property. The western portion of the site slopes from Slater Avenue NE east towards Forbes Lake. No buildings exist on the subject site.

The City of Kirkland classifies its wetlands according to the Kirkland Zoning Code (KZC), Chapter 90. Forbes Lake covers the eastern half of the property, and the wetland boundary extends west of the lake towards Slater Avenue NE. Therefore, one contiguous wetland covers the eastern 3/4 of the subject site. Forbes Lake and the associated wetland continue north and south of the subject site. No streams exist on-site. Under KZC, Section 90.30, the on-site wetland is categorized as a Type 1 wetland. Under KZC, Section 90.45, Type 1 wetlands are typically designated 100-foot buffers. To accommodate a single-family residence in the western 1/4 of the property, the applicant is proposing reasonable use to reduce the standard buffers pursuant to KZC Section 90.140.

The vegetation within the on-site wetland (west of the open water portion of the wetland) contains a few trees and a dense shrub layer. Black cottonwood trees are present in the wetland, while willows and hardhack dominate the dense shrub layer. The understory in the wetland portions on-site is very open, because the thick shrub layer does not allow the needed sunlight to penetrate through. West of the wetland edge, native vegetation exists for approximately 20 feet toward Slater Avenue NE. The area to the west of the native vegetation has been recently cleared and is currently dominated by Himalayan blackberry and reed canarygrass, both of which are non-native species. No canopy or shrub layer exists in the western portion of the property where the clearing occurred.

WETLAND CLASSIFICATION - COWARDIN SYSTEM

According to the Cowardin System, developed by the U.S. Fish and Wildlife Service and described in Classification of Wetlands and Deepwater Habitats of the United States, the classification for the on-site wetland is as follows:

On-site Wetland: Palustrine, Aquatic Bed, Rooted Vascular

WETLAND CLASSIFICATIONS - CITY OF KIRKLAND

Under the City of Kirkland Sensitive Areas Ordinance, Section 90.30, the on-site wetland is classified as follows:

On-site Wetland: Type 1 Wetland. The Forbes Lake wetland, which covers the entire eastern 3/4 of the subject site, is a Type 1 wetland. It is equal to or greater than 10 acres in size and has three or more wetland classes, one of which is open water (KZC 90.30.17c). Type 1 wetlands generally receive 100-foot buffers in the city of Kirkland.

WETLAND DETERMINATION REPORT

Methodology:

On-site, the routine methodology described in the Washington State Wetlands Identification and Delineation Manual (Washington State Department of Ecology Publication #96-94, March 1997) was used to make a determination, as required by the City of Kirkland. Under this method, the process for making a wetland determination is based on three sequential steps:

- 1.) Examination of the site for hydrophytic vegetation (species present and percent cover);
- 2.) If hydrophytic vegetation is found, then the presence of hydric soils is determined.
- 3.) The final step is determining if wetland hydrology exists in the area examined under the first two steps.

The following criteria descriptions were used in the boundary determination:

Wetland Vegetation Criteria:

The 1997 edition of the Washington State Wetlands Identification and Delineation Manual defines hydrophytic vegetation as "the sum total of macrophytic plant life that occurs in areas where the frequency and duration of inundation or soil saturation produce permanently or periodically saturated soils of sufficient duration to exert a controlling influence on the plant species present." Field indicators were used to determine whether the vegetation meets the definition for hydrophytic vegetation.

Wetland Soils Criteria and Mapped Description:

The 1997 edition of the Washington State Wetlands Identification and Delineation Manual defines hydric soils as "soils that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part." Field indicators were used to determine whether a given soil meets the definition for hydric soils.

The Soil Conservation Service mapped the subject property as Alderwood gravelly sandy loam soils with 6 to 15 percent slopes. The Alderwood soils are considered to be moderately deep over a hardpan and moderately well drained soils that formed under conifers in glacial till. Permeability of this Alderwood soil is moderately rapid in the surface layer and subsoil and very slow in the substratum. Available water capacity is low, runoff is slow to medium, and the hazard of erosion is moderate. This soil is used for urban development, timber, pasture, berries, and row crops.

Wetland Hydrology Criteria:

The 1997 edition of the Washington State Wetlands Identification and Delineation Manual states that the "term wetland hydrology encompasses all hydrologic characteristics of areas that are periodically inundated or have soils saturated to the surface for a sufficient duration during the growing season." It also explains that "areas with evident characteristics of wetland hydrology are those where the presence of water has an overriding influence on characteristics of vegetation and soils due to anaerobic and chemically reducing conditions, respectively."

Additionally, the manual states that "areas which are seasonally inundated and/or saturated to the surface for a consecutive number of days ≥ 12.5 percent of the growing season are wetlands, provided the soil and vegetation parameters are met. Areas inundated or saturated between 5 and 12.5 percent of the growing season in most years may or may not be wetlands. Areas saturated to the surface for less than 5 percent of the growing season are non-wetlands." Field indicators were used to determine whether wetland hydrology parameters were met on this site.

BOUNDARY DETERMINATION FINDINGS**On-site Wetland Areas:**

The on-site wetland is a Type 1 wetland. The open water of Forbes Lake occupies most of the on-site wetland. The wetland area to the west of the open water contains a few black cottonwood (*Populus balsamifera*-Fac) trees. However, shrubs such as willows (*Salix spp.*-Fac-FacW) and hardhack (*Spiraea douglasii*-FacW) dominate the wetland vegetation, with very few herbaceous plants existing in the understory. The dominance of these "Facultative Wet" plant species indicate that the wetland area supports hydrophytic vegetation.

The soils in the wetland area west of the open water on-site generally display Munsell colors of black (10YR 2/1) from the surface to greater than 18" below the

surface. The soils have an organic/silt texture, and were slightly moist from 0-18" throughout the wetland area at the time of investigation.

The presence of wetland plant species indicates that the observed hydrology persists into the growing season. The soil colors described above also indicate persistent wetland hydrology. Therefore, it appears that the on-site wetland meets the hydrological parameters outlined in the delineation manual.

Non-wetland Area:

The vegetation in the non-wetland area on-site varies. The buffer areas within 20 feet west of the wetland edge contain native trees and shrubs such as black cottonwood, red alder (*Alnus rubra*-Fac), and willows. The non-wetland area west of those native trees and shrubs has been recently cleared and contains only herbaceous species such as reed canarygrass (*Phalaris arundinacea*-FacW), Himalayan blackberry (*Rubus discolor*-FacU), and horsetail (*Equisetum spp.*-Fac). Himalayan blackberry and reed canarygrass are non-native species that easily adapt to disturbance and are opportunistic plant species.

The soils in the non-wetland portion of the site differ from the soils in the wetland portion of the site. From the surface to 18" below the surface, the soils in the non-wetland portion of the site generally display a Munsell color of olive brown (2.5Y 4/3). During the site investigation, the non-wetland soils were dry with a texture of sandy loam.

PROJECT DESCRIPTION AND REASONABLE USE PROPOSAL

The applicant is proposing a single-family residence in the SW portion of the subject site. The single-family residence would be constructed 20 feet east of Slater Avenue and 10 feet north of the southern property boundary to observe the required building setbacks. Pursuant to the Reasonable Use portion of the KZC, Section 90.140, the applicant is proposing to reduce the wetland buffer to accommodate the single-family residence. In exchange, buffer enhancement is proposed within the remaining buffer area to replace the invasive species with native trees and shrubs. This Reasonable Use application would increase the functions and values of the existing wetland buffer on-site.

BUFFER ENHANCEMENT PLANTINGS

In exchange for a reduction of the standard wetland buffer, the applicant is proposing to remove all non-native vegetation that occupies the remaining buffer area and enhance it with native vegetation. The proposed buffer enhancement area is 5,711 square feet in size. Shrubs will be planted across the entire 5,710 square feet of the enhancement area. The applicant is also proposing to plant native trees north of the proposed house to the northern property boundary. The area proposed for planting native trees is 3,006 square feet in size (see map). This area has been cleared and the plantings will increase the functions and values of the buffer. The proposed distribution of native plants is as follows:

<i>Proposed Buffer Enhancement Plantings (5,711 s.f. of shrubs and 3,006 s.f. of trees)</i>				
<u>Common Name</u>	<u>Latin Name</u>	<u>Size</u>	<u>Spacing</u>	<u>Quantity</u>
1. Western red cedar	<i>Thuja plicata</i>	1 gallon	10'	5
2. Paper birch	<i>Betula papyrifera</i>	1 gallon	10'	5
3. Big-leaf maple	<i>Acer macrophyllum</i>	1 gallon	10'	5
4. Vine maple	<i>Acer circinatum</i>	1 gallon	5'	34
5. Osoberry	<i>Oemleria cerasiformis</i>	1 gallon	5'	33
6. Red elderberry	<i>Sambucus racemosa</i>	1 gallon	5'	33
7. Honeysuckle	<i>Lonicera involucrata</i>	1 gallon	5'	33
8. Cascara buckthorn	<i>Rhamnus purshiana</i>	1 gallon	5'	33

ESTIMATED PROJECT COST

Quantity of One-gallon plants	181 @ 8.25/plant
TOTAL ESTIMATED COST OF PLANT MATERIAL AND LABOR	\$1,493.25

PLANTING NOTES

Planting shall take place in the early spring or late fall. Plants should be obtained from a reputable nursery. All plant materials recommended in this plan are typically available from local and regional sources, depending on seasonal demand. Some limited species substitution (including bareroot stock) may be allowed, only with the agreement of the consulting biologist or City of Kirkland biologist. Care and handling of plant materials is extremely important to the overall success of this enhancement project.

The plants shall be arranged with the appropriate numbers, sizes, species, and distribution to achieve the required vegetation coverage. The actual placement of individual plants shall mimic natural, asymmetric vegetation patterns found on similar undisturbed sites in the vicinity.

PROJECT MONITORING PROGRAM

Requirements for monitoring project:

1. Initial compliance report
2. Semi-annual site inspections (spring and fall) for a period of three years
3. Annual reports (one written report submitted in the fall of each monitored year)

The purpose for monitoring this enhancement project shall be to evaluate its success. Success will be determined if monitoring shows at the end of three years that the definition of success (stated below) is met. The property owner shall grant access to the enhancement area for inspection and maintenance to the contracted wetland professional and the City of Kirkland biologist during the monitoring period, or until the project is evaluated as successful.

Criteria for Success: Upon completion of the proposed buffer enhancement project, an inspection by a certified wetland professional shall be made to determine plan compliance. Condition monitoring of the plantings shall be done by a certified wetland professional. Final inspection will occur three years after completion of the project, and the consulting wetland professional will prepare a report as to the success of the project.

Definition of Success: The buffer enhancement area shall support at least 80% of the native plants set forth in the approved restoration plan by the end of three years. The species mix should resemble that proposed in the plan, but strict adherence to obtaining all of the species shall not be a criterion for success. By the end of the third growing season, the percent aerial coverage of native plants shall be 80% in the enhancement area and total invasive species such as reed canarygrass and Himalayan blackberry shall not exceed 10 percent.

Maintenance: The buffer enhancement area will require periodic maintenance during the monitoring period. Maintenance may include, but will not require or be limited to, removal of competing grasses and invasive vegetation (by hand if necessary), irrigation, replacement of plant mortality, fertilization, and/or the replacement of mulch. Aggressive control of invasive grasses and Himalayan blackberry will likely be required in the proposed enhancement area. Appropriate maintenance requirements will be determined by site monitoring

Contingency Plan:

If 20% of the installed plants are severely stressed during any of the inspections, or it appears that 20% may not survive, additional plantings of the same species may be added to the planting areas. Elements of a contingency plan may include, but will not be limited to, more aggressive weed control, animal control, mulching, replanting with larger plant material, species substitution, fertilization, soil amendments, and/or irrigation.

EXISTING WETLAND FUNCTIONS AND VALUES ASSESSMENT

Methodology:

The methodology for this functions and values assessment is based on professional opinion developed through past field analyses and interpretation. This assessment pertains specifically to the wetland and stream systems on-site, but is typical for assessments of similar systems throughout western Washington.

Analysis:

The wetland on the subject property serves important functions to the surrounding environment such as hydrologic control, water quality improvement, and wildlife habitat.

Hydrologic control (flood control and water supply) is an important function provided by wetlands in western Washington. Wetlands function as natural water storage areas during periods of high precipitation. Wetlands with limited outlets store greater amounts of water than wetlands with unrestricted flow outlets. The depressional characteristics of wetlands often accumulate stormwater runoff. The ponded nature of many wetlands acts to store any excess stormwater that reaches the wetlands. The subject wetland creates a natural water-retention system.

The wetland on-site also provides important water quality features. Water quality is closely tied to hydrologic control. Wetlands are areas into which floodwaters spread during periods of high runoff. As water flows through wetlands, it is slowed by vegetation, and sediment settles to the bottom before the water moves further downstream. Suspended soils in the water may be removed as the water moves through wetlands, resulting in cleaner water entering streams, rivers, and lakes. Due to the on-site wetland, sediment may be trapped and water quality will be improved as the water moves through the site. The cleared buffer area east of Slater Avenue NE does not contain shrubs or trees, and therefore could be improved by the buffer enhancement that is proposed.

Many wildlife species are expected to utilize Forbes Lake and its associated wetland edges, because the site provides valuable habitat for avian, mammal, and amphibian species. Forbes Lake and its associated wetland edges provide movement corridors, which become increasingly important as areas become developed. The on-site wetland contains resources such as food, water, thermal cover, and hiding cover in close proximity, which wildlife species require to thrive. The following are typical avian species that may utilize the on-site habitat: American crow (*Corvus brachyrhynchos*), American robin (*Turdus migratorius*), black-capped chickadee (*Poecile atricapillus*), bushtit (*Psaltriparus minimus*), common raven (*Corvus corax*), rufous-sided towhee (*Pipilo erythrophthalmus*), song sparrow (*Melospiza melodia*), steller's jay (*Cyanocitta stelleri*), winter wren (*Troglodytes troglodytes*), and many different waterfowl species. Mammalian species that may utilize this site include

species that easily adapt to suburban environments such as bats (*Myotis spp.*), black-tailed deer (*Odocoileus hemionus columbianus*), deer mice (*Peromyscus maniculatus*), eastern cottontail rabbits (*Sylvilagus floridanus*), moles (*Scapanus spp.*), raccoons (*Procyon lotor*), shrews (*Sorex spp.*), skunks (*Mephitis spp.*), squirrels (*Sciurus carolinensis*, *Tamiasciurus douglasii*), and Virginia opossums (*Didelphis virginiana*). Although no egg masses, juveniles, or adult amphibians were observed during the field survey, some species are expected to occur within the wetland or adjacent habitats. The expected amphibian species include the pacific tree frog (*Hyla regilla*), the bullfrog (*Rana catesbeiana*), and the northwestern salamander (*Ambystoma gracile gracile*). These lists are not intended to be all-inclusive, and may omit some bird, mammal, or amphibian species that do utilize the site. Some of the wetland buffer contains valuable wildlife habitat as well. However, the cleared area currently provides little wildlife habitat to most species and could be improved by planting native trees and shrubs.

Along with the functions and values discussed above, the subject wetland provides additional important functions and values such as aesthetic value, recreational opportunities, and educational tools.

Conclusion:

The overall functions and values of the wetland on the subject property are moderate to high.

POST-MITIGATION WETLAND FUNCTIONS AND VALUES

The proposed buffer reduction through reasonable use will not adversely affect the functions and values in any manner. In fact, the hydrologic control, water quality, and wildlife habitat will be improved with the increased number of native plants in the buffer. The buffer area from Slater Avenue NE toward the wetland edge has been cleared and non-native vegetation has invaded the area. Therefore, the applicant is proposing to replace all the non-native vegetation with native trees and shrubs. By doing so, the enhanced buffer area will provide better functions and values than currently exist. In this case, there is no practical or feasible alternative development proposal that would result in less impact to the buffer. Hydrologic control, water quality, and wildlife habitat within the buffer area will be improved by the proposed buffer enhancement.

USE OF THIS REPORT

This Sensitive Areas Study is supplied to Charles Rosinski as a means of determining on-site wetland conditions, as required by the City of Kirkland during the permitting process. This report is based largely on readily observable conditions and, to a lesser extent, on readily ascertainable conditions. No attempt has been made to determine hidden or concealed conditions. Reports may be adversely

affected due to the physical condition of the site, which may lead to observation or probing difficulties.

The laws applicable to wetlands are subject to varying interpretations and may be changed at any time by the courts or legislative bodies. This report is intended to provide information deemed relevant in the applicant's attempt to comply with the laws now in effect.

The work for this report has conformed to the standard of care employed by wetland ecologists. No other representation or warranty is made concerning the work or this report and any implied representation or warranty is disclaimed.

Wetland Resources, Inc.

A handwritten signature in black ink, appearing to read "John Laufenberg". The signature is fluid and cursive, with the first name "John" written in a larger, more prominent script than the last name "Laufenberg".

John Laufenberg
Principal Wetland Ecologist

REFERENCES

Cowardin, et al., 1979. Classification of Wetlands and Deepwater Habitats of the United States. U.S.D.I. Fish and Wildlife Service. FWS/OBS-79/31. December 1979.

National List of Plant Species that Occur in Wetlands, Northwest Region. 1996. U.S. Department of the Interior, Fish and Wildlife Service. Washington, D.C.

Soil Survey: King County Area, Washington. U.S.D.A. Soil Conservation Service. November 1973.

City of Kirkland Zoning Code: Sensitive Areas Ordinance, Chapter 90. Revision Date: May, 2001. Kirkland, WA.

Washington State Wetlands Identification and Delineation Manual. Washington State Department of Ecology. Publication #96-94. March 1997.

Field Data Sheet
Rosinski Lot 5/Slater Avenue-WRI #03198
Investigation Date: 08/20/03

Pit	Depth	Texture	Color	Moisture	Species	%	Status	Strata
S1 Wetland	0-18"+	organic/silt	10YR 2/1	sl. moist	<i>Populus balsamifera</i>	20	Fac	tree
					<i>Salix sitchensis</i>	45	FacW	shrub
					<i>Rubus spectabilis</i>	20	Fac+	shrub
					<i>Spiraea douglasii</i>	25	FacW	shrub
					<i>Rubus discolor</i>	tr	FacU	herb
<i>Ranunculus repens</i>	tr	FacW	herb					

Conclusion: Wetland - Parameters for wetland hydrology, hydrophytic vegetation, and hydric soils are met.

S2 Non-Wetland	0-18"	sandy loam	2.5Y 4/3	dry	<i>Populus balsamifera</i>	20	Fac	tree
					<i>Phalaris arundinacea</i>	50	FacW	herb
					<i>Rubus discolor</i>	35	FacU	herb
					<i>Equisetum spp.</i>	15	Fac	herb

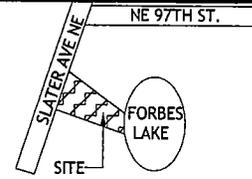
Conclusion: Non-Wetland - Parameters for hydric soils and wetland hydrology are not met.

LEGEND

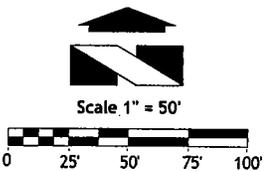
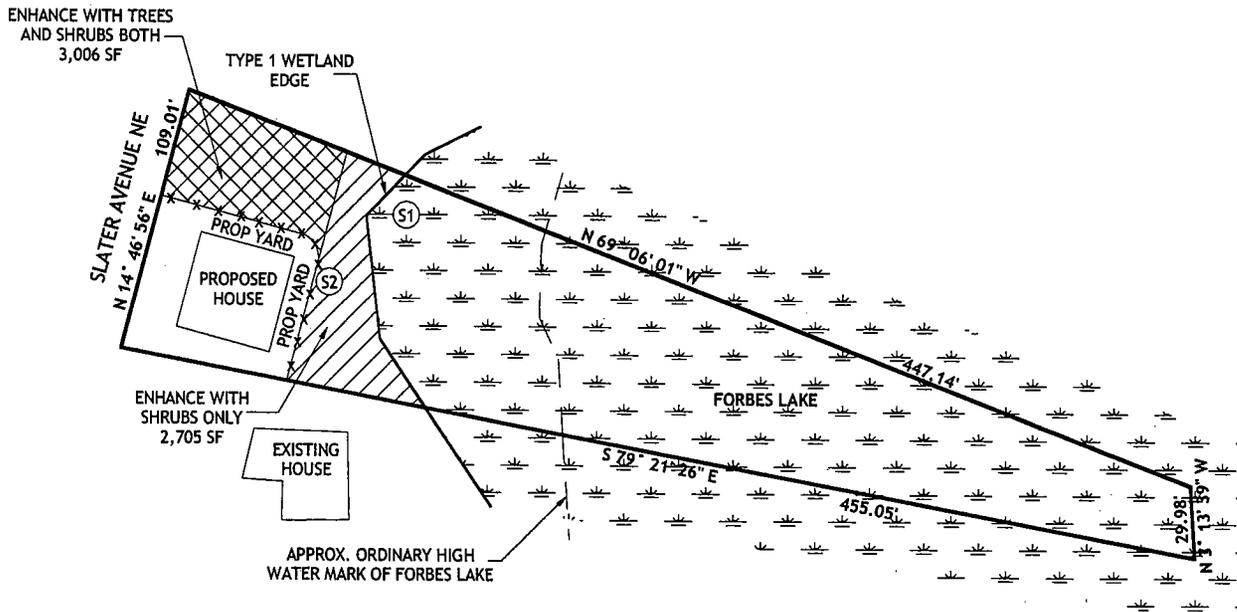
-  WETLAND
-  BUFFER ENHANCEMENT (SHRUBS ONLY)
-  BUFFER ENHANCEMENT (TREES AND SHRUBS)
-  DATA SITES
-  PROPOSED BUFFER EDGE

**ROSINSKI - LOT 5/SLATER AVE
SENSITIVE AREA STUDY MAP
CITY OF KIRKLAND, WA
A PORTION OF SECTION 4, TWNP 25N, RGE 5E, W.M.**

VICINITY MAP




NTS



Wetland Resources, Inc.
Delineation/Mitigation/Restoration/Habitat Creation/Permit Assistance
9505 19th Avenue S.E. Suite 106 Everett, Washington 98208
Phone (425) 337-3174
Fax (425) 337-3045
mailto:mail@wetlandresources.com

**ROSINSKI - LOT 5/SLATER AVE
Sensitive Area Study Map
City of Kirkland, WA** Sheet 1/1

Charles Rosinski Job # 03198
19916 Old Owen Rd. Drawn by: S. Spooner
Suite 211 Date: August 20, 2003
Monroe, WA 98272 Rev. #1: April 28, 2005



JOHNSMONROEMITSUNAGA
P L L C

Robert D. Johns Michael P. Monroe Darrell S. Mitsunaga Duana T. Koloušková

Tony Leavitt, Planner
City of Kirkland
Department of Planning and Community
Development
123 5th Avenue
Kirkland, WA 98033

April 28, 2005

Re: Lot 5/Slater Avenue, Reasonable Use Application

Dear Tony:

As you are already aware, this office represents Charles Rosinski with respect to his property known as Lot 5 on Slater Avenue. This letter and the materials submitted herewith constitute Mr. Rosinski's application for reasonable use approval to construct one single family residence on Lot 5, accessed from Slater Avenue N.E.

As you are already aware, Mr. Rosinski submitted an application for wetland buffer modification in August, 2004, which included a detailed wetland report from Wetland Resources, Inc. Mr. Rosinski submitted that application for wetland buffer modification based on the City's prior written finding that "a Wetland Buffer Modification/Reduction is a viable option for Mr. Rosinski to allow for the construction of one new single-family residence." A copy of the City's original letter finding that the buffer modification was the appropriate review process is attached hereto.

After Mr. Rosinski submitted his original application, the City determined that Mr. Rosinski should instead apply for a reasonable use approval and that staff would not support a buffer modification. As a result, Mr. Rosinski hereby submits this application for reasonable use.

As you are aware, Mr. Rosinski has already paid \$7953.50 in application fees based on the City's prior determination that Mr. Rosinski had to submit an application for buffer modification. In addition, Mr. Rosinski has lost approximately eight months of time due to the City's change of heart. Mr. Rosinski would not have submitted the buffer modification application but for the City's written determination that such was the appropriate review process. As a result, we request the City to (a) expedite this second

ATTACHMENT 6

2005-00016

application for reasonable use and (b) apply all fees previously paid toward the review of this reasonable use application.

Turning to the reasonable use application, following is a discussion of how Mr. Rosinski's proposal meets the reasonable use standards listed in Kirkland Municipal Code §90.140. The code provisions are set forth in bold, and answers follow in sequence.

There is no permitted type of land use for the property with less impact on the sensitive area and the buffer is feasible and reasonable.

The legally platted lot is encumbered by a Type 1 wetland and its associated buffer. Mr. Rosinski desires to construct a modest single family home on a this previously platted single family residential lot. Mr. Rosinski does not propose to construct any structures in the wetland itself. The single family residence will be confined to the buffer and placed on the corner of the lot at the furthest point possible from the wetland. Mr. Rosinski has designed a house well below the size and dimensional allowance that might otherwise be permitted for the property but for the sensitive area restrictions.

No on-site alternative to the proposal is feasible and reasonable, considering possible changes in site layout, reductions in density and similar factors.

Correct, see above discussion. The single family residence is proposed for the only feasible location on the lot at the furthest distance possible from the sensitive area.

The proposal, as conditioned, will result in a minimum feasible alteration or impairment to the functional characteristics of the sensitive areas, and their existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and will not cause significant degradation of groundwater or surface-water quality.

Mr. Rosinski has provided a sensitive areas study by Wetland Resources, Inc., which recommends enhancement of the on-site buffer with native vegetation. Currently, significant portions of the buffer are covered by non-native vegetation. Mr. Rosinski proposes to reduce the typical 100 foot buffer to allow for construction of the single family home, and in exchange, to enhance the remaining portions of the on-site wetland buffer with native vegetation. Wetland Resources concludes that such actions "would increase the functions and values of the existing wetland buffer on-site." The on-site buffer enhancements will improve hydrologic control, water quality, and wildlife habitat for the buffer and, consequently, the wetland itself.

The inability to derive a reasonable use is not the result of the applicant's actions.

Mr. Rosinski purchased Lot 5 after it was platted. Mr. Rosinski has not adjusted the boundary lines or in any other manner affected the dimensions of the lot. Mr. Rosinski has not taken any actions that would operate to create the need for reasonable use. Simply, the lot as approved by the governing authority is the same and necessitates a reasonable use approval.

The land use and environmental regulations which prevent reasonable use of the property were in effect at the time the applicant purchased the property.

To the best of Mr. Rosinski's knowledge the land use and environmental regulations which prevent reasonable use of the property were in effect at the time the applicant purchased the property. Mr. Rosinski purchased the property with the intention of constructing a single family residence once sewer was extended to the lot, which took a few years. Mr. Rosinski's proposed use is consistent with the intended use for Lot 5 when the property was subdivided.

Thank you for your review of this application. Again, we request that all fees previously paid by Mr. Rosinski be applied to this reasonable use application and that the review process be expedited.

Sincerely,



Duana T. Koloušková

Direct Tel: (425) 467-9966

Email: kolouskova@jmmlaw.com

Enclosures

cc: Client

1820-1 application letter to City 4-26-05



The Watershed Company

23 August 2005

Tony Leavitt
City of Kirkland Planning Department
123 Fifth Avenue
Kirkland, WA 98033

RECEIVED

AUG 24 2005

AM PM
PLANNING DEPARTMENT

Re: Rosinski property reasonable use application- environmental review

Dear Tony:

Thank you for the opportunity to review the reasonable use application on the Rosinski property located at 95XX Slater Avenue NE in Kirkland. This letter shall serve as our environmental review of the proposal.

In addition to a site visit on August 3rd, 2005, the following documentation was reviewed:

- 1) The Sensitive Areas Study for Reasonable Use, prepared by Wetland Resources Inc. (WRI), was reviewed. This document is dated 8/20/05 (revised 4/28/05).
- 2) 1/21/04 letter to Kirkland Planner Tony Leavitt from Adolfsen reviewing the wetland delineation.

Findings

The applicant is proposing a modest sized home on a highly encumbered lot. From the reduced-scale drawings provided in the WRI report the home appears to have a footprint of roughly 1,850 square feet. A modest yard is also proposed, appearing to be just large enough to have a reasonable setback from the road and side- and backyards sized large enough only to provide maintenance access. Overall, the scale of the proposed development is reasonable.

The drawing included in the WRI report does not appear to have been generated by a professional land surveyor. This drawing should be compared to a survey of the property to verify that the wetland boundary, buffer mitigation areas and home site are accurately shown.

WRI is proposing to remove invasive weeds and install native trees and shrubs in buffer areas that would remain outside of the home/ yard portion of the lot. Generally, this is an acceptable approach to mitigate for impacts while still allowing reasonable use of the site. However there are a number of problems with the specific details of the proposed mitigation actions.

No fence, barrier or signage is proposed to demarcate the yard area from the buffer mitigation area. Barriers and signage are necessary to prevent future encroachment into the buffer.

The plan states that all non-native vegetation would be removed from the mitigation area. However there is no description of how this removal would be carried out. Blackberry, reed canarygrass and Japanese knotweed are present and would need to be removed. These species are very difficult to eradicate from any site, thus a detailed plan is needed on how to remove each of these species. At minimum the plan should recommend tilling or raking to remove roots with follow-up herbicide applications to kill sprouting roots that are missed. Japanese knotweed is effectively killed by injection of herbicide into the hollow stems.

ATTACHMENT <u>7</u>
<u>ZONOS-00016</u>

The species selection of enhancement plantings is appropriate for this site, but planting densities are incorrectly calculated. Trees and shrubs are to be planted with on-center spacing of 10- and 5-feet, respectively, per the chart on page 5 of the WTI report. These are appropriate spacing numbers. However the table also shows that only 15 trees and 166 shrubs are to be planted. At 10-foot spacing the tree total should come to 34; at 5-foot spacing, the shrubs should come to 264. This is based on spacing multipliers of 0.0462 for trees and 0.0116 for shrubs.

Also, there is room for more trees in the area depicted as devoted to shrubs only. The tree and shrub area should extend farther east to the wetland boundary and there is room for more trees along the southern site boundary from the edge of the proposed yard all the way to the wetland edge.

The estimated project cost lists an installed price of \$8.25 per plant as its only line item. The King County Bond Quantity Worksheet, which The City of Kirkland prefers to use (Tovar, pers. comm., 8/4/05), lists the installed price of 1-gallon plants at \$13.54. Also, no other project costs are included such as the significant cost of removing invasive weeds. Similarly, no monitoring or maintenance costs are provided over the life of the project. Thus, for bonding purposes, this cost is far too low.

The soil on the site appears to be historic fill, as it is gravelly and compacted. Soil amendments should be proposed. This could be in the form of compost tilled into the top several inches across the planting area. Area-wide amendments are much preferred to planting pit only amendment and generally results in lower mortality and lower maintenance costs.

Irrigation is briefly mentioned in the maintenance section of the plan; however, a temporary system should be proposed to be installed at the beginning of the project. This system should provide a minimum of 1 inch per week over all planted areas for the first growing season (March 15th to October 1st). The system should remain in place for the duration of the monitoring in case replacement plantings need irrigation.

The monitoring plan is proposed to extend for three years post construction. Due to the density of invasive weeds on this site and the likelihood of re-invasion, a 5-year maintenance and monitoring schedule is more appropriate. This will allow the installed plants to mature to the point where they can compete against re-invasion of non-native plants once maintenance ceases.

The annual schedule for monitoring is acceptable, however there is no set schedule for regular maintenance. Weeding of individual plants and to remove invasive should take place a minimum of twice per growing season.

Performance standards for the mitigation site, listed under "Definition of Success", are acceptable. The only modification would be to change from references of the third year to the fifth year.

Incorporation of woody debris and/or bird nest boxes into the plan would increase buffer function with minimum expense.

Recommendations

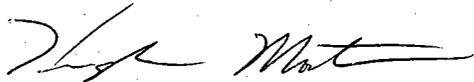
The following changes/additions to the proposed mitigation plan are recommended:

- 1) Verify that the drawings in the WRI report match a survey drawing of the site.
- 2) Incorporate a split rail fence or other suitable barrier (dense hedgerow) between the proposed yard and the buffer mitigation area. At least two sensitive area signs shall be mounted on the fence or in front of the barrier.
- 3) Provide a detailed plan for removal of invasive weeds. Specific plans for different weeds may be warranted.
- 4) Increase the total number of installed plants, by using the multipliers provided above.
- 5) Propose more trees where appropriate on the plan, as described above.
- 6) Propose to amend soils across the mitigation site.
- 7) Include provisions for a temporary irrigation system to conform to the watering requirements given above.
- 8) Increase the maintenance and monitoring period to five years. Stipulate that maintenance (weeding) take place a minimum of twice per growing season.
- 9) Alter performance standards to reflect the change from three to five years.
- 10) Incorporate woody debris and/or bird nest boxes into the proposed mitigation plan.

Incorporation of the above recommendations into the buffer modification plan will ensure that the proposal will have a minimum impact on the wetland and will improve buffer conditions on this property.

Please call if you have any questions or if you need further assistance on this project.

Sincerely,



Hugh Mortensen
Ecologist/PWS

References

- 1) Tovar, Patrice. Senior Planner, City of Kirkland Planning Department. Personal communication, telephone conversation with Hugh Mortensen (The Watershed Company), 8/4/05.



PLEASE TYPE OR PRINT
SEE BACK PAGE

REAL ESTATE EXCISE TAX AFFIDAVIT

CHAPTER 82.45 RCW - CHAPTER 458.61 WAC
FOR USE AT COUNTY TREASURER'S OFFICE

(Use Form No. 84-0001B for Reporting Transfers of Controlling Interest of Entity Ownership to the Department of Revenue)
THIS AFFIDAVIT WILL NOT BE ACCEPTED UNLESS ALL AREAS 1-7 ARE FULLY COMPLETED

600-10167977

This form is your receipt
when stamped by cashier

1 SELLER GRANTOR	Name KEITH A. GOSNEY AND KIMIKO GOSNEY, husband and wife	2 BUYER GRANTEE	Name CLI-LLC, a Washington Limited Liability company, and CHARLES B. ROSINSKI, as his separate estate
	Street PO Box 232		Street PO Box 5000-139
	City/State/Zip Cold Bay, WA 98111		City/State/Zip Duvall, WA 98019
3 ADDRESS TO SEND ALL PROPERTY TAX RELATED CORRESPONDENCE		4 ALL TAX PARCEL NUMBERS	
Name Same as Grantee		1238500685	
Street		1800	
City/State/Zip		COUNTY TREASURER PLACE ASSESSED VALUE IF TAX EXEMPT	

4 LEGAL DESCRIPTION OF PROPERTY SITUATED IN UNINCORPORATED King COUNTY OR IN CITY OF _____

Street Address (if property is improved)
**Lot 5, Block 43 of Burke and Farrar's Kirkland Addition to the City of
Seattle, as per plat recorded in volume 20 of plats, page 14, records of King
County, Washington.
Situate in the City of Kirkland, County of King, State of Washington.**

5 Is this property currently

Classified or designated as forest land? Chapter 84.33 RCW	YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>
Classified as current use land (open space, farm and agricultural, or timber)? Chapter 84.34 RCW	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Exempt from property tax as a nonprofit organization? Chapter 84.36 RCW Seller's Exempt Reg No _____	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Receiving special valuation as historic property? Chapter 84.26 RCW	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Property Type land only land with new building
 land with previously used building land with mobile home
 timber only building only

Principal Use Apt (4- unit) residential
 timber agricultural commercial/industrial
 other

6 Description of personal property included in gross selling price, both
tangible (eg, furniture, equipment, etc.) or intangible (eg, goodwill,
agreement not to compete, etc.)

If exemption claimed, list WAC number and explanation
WAC No. (Sec/Sub) _____
Explanation _____

Type of Document **Statutory Warranty Deed**
Date of Document **July June 8 2004**

Gross Selling Price \$	22,000.00
Personal Property (deduct) \$	-0-
Taxable Selling Price \$	22,000.00
Excise Tax State \$	-0-
Local \$	-0-
Delinquent Interest State \$	-0-
Local \$	-0- 1.75
Delinquent Penalty \$	-0-
Total Due \$	391.60

A MINIMUM OF \$2.00 IS DUE AS A PROCESSING FEE AND TAX

8 (1) NOTICE OF CONTINUANCE (RCW 84.33 OR RCW 84.34)
If the new owner(s) of land that is classified or designated as current use
or forest land wish to continue the classification or designation of such
land the new owner(s) must sign below. If the new owner(s) do not desire to
continue such classification or designation, all compensating or
additional tax calculated pursuant to RCW 84.33.120 and 84.34 or RCW
84.34.108 shall be due and payable by the seller or transferor at the time of
sale. The county assessor must determine if the land transferred
qualifies to continue classification or designation and must so indicate
below. Signatures do not necessarily mean the land will remain in
classification or designation. If it no longer qualifies, it will be removed
and the compensating taxes will be applied. All new owners must sign

This land does does not qualify for continuance

Date _____ DEPUTY ASSESSOR

(2) NOTICE OF COMPLIANCE (Chapter 84.26 RCW)
If the new owner(s) of property with special valuation as historic property
wish to continue this special valuation the new owner(s) must sign below.
If the new owner(s) do not desire to continue such special valuation, all
additional tax calculated pursuant to Chapter 84.26 RCW, shall be due
and payable by the seller or transferor at the time of sale

(3) OWNER(S) SIGNATURE

7 AFFIDAVIT

I Certify Under Penalty of Perjury Under The Laws of The State of
Washington That The Foregoing Is True And Correct. (See back page of this
form)

Signature of Grantor/Agent Keith A. Gosney
Name (print) Keith A. Gosney
Date and Place of Signing 7/8/04 Kirkland

Signature of Grantee/Agent Charles B. Rosinski
Name (print) Charles B. Rosinski
Place of Signing 7/8/04 Kirkland

correctional institution for a maximum term of not more
than 90 days, or by both imprisonment and

Perju
than fi
fine (F

REV 84 **E2053717**
07/08/2004 13 10
KING COUNTY, WA
TAX \$391.00
SALE \$22,000.00

ATTACHMENT 8
2005.00016

TO WHOM IT MAY CONCERN:

This is to certify that at the time of our purchase and sale agreement the property was unbuildable. Therefore the sales price is a reflection of that and is our true sales price of \$22,000.00.

Dated this 8 day of July, 2004

CLT-LLC
CLT-LLC

Charles B. Rosinski
Charles B. Rosinski

Keith A. Gosney
Keith A. Gosney

Kimiko Gosney
Kimiko Gosney

State of Washington
County of King

I certify that I know or have satisfactory evidence that Charles B. Rosinski, Keith A. Gosney & Kimiko Gosney is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in the instrument

Dated 7/8/04

(SEAL OR STAMP)

[Signature]
(Signature)

Notary
Title

My appointment expires 6/11/07

ACKNOWLEDGEMENT - INDIVIDUAL
Form 5998 (Rev 8-88)

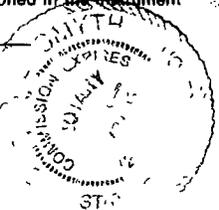
State of Washington
County of King

I certify that I know or have satisfactory evidence that Charles B. Rosinski is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged it as the member

of CLT-LLC (TYPE OF AUTHORITY, E.G., OFFICER, TRUSTEE ETC) to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument

Dated 7/8/04

(SEAL OR STAMP)

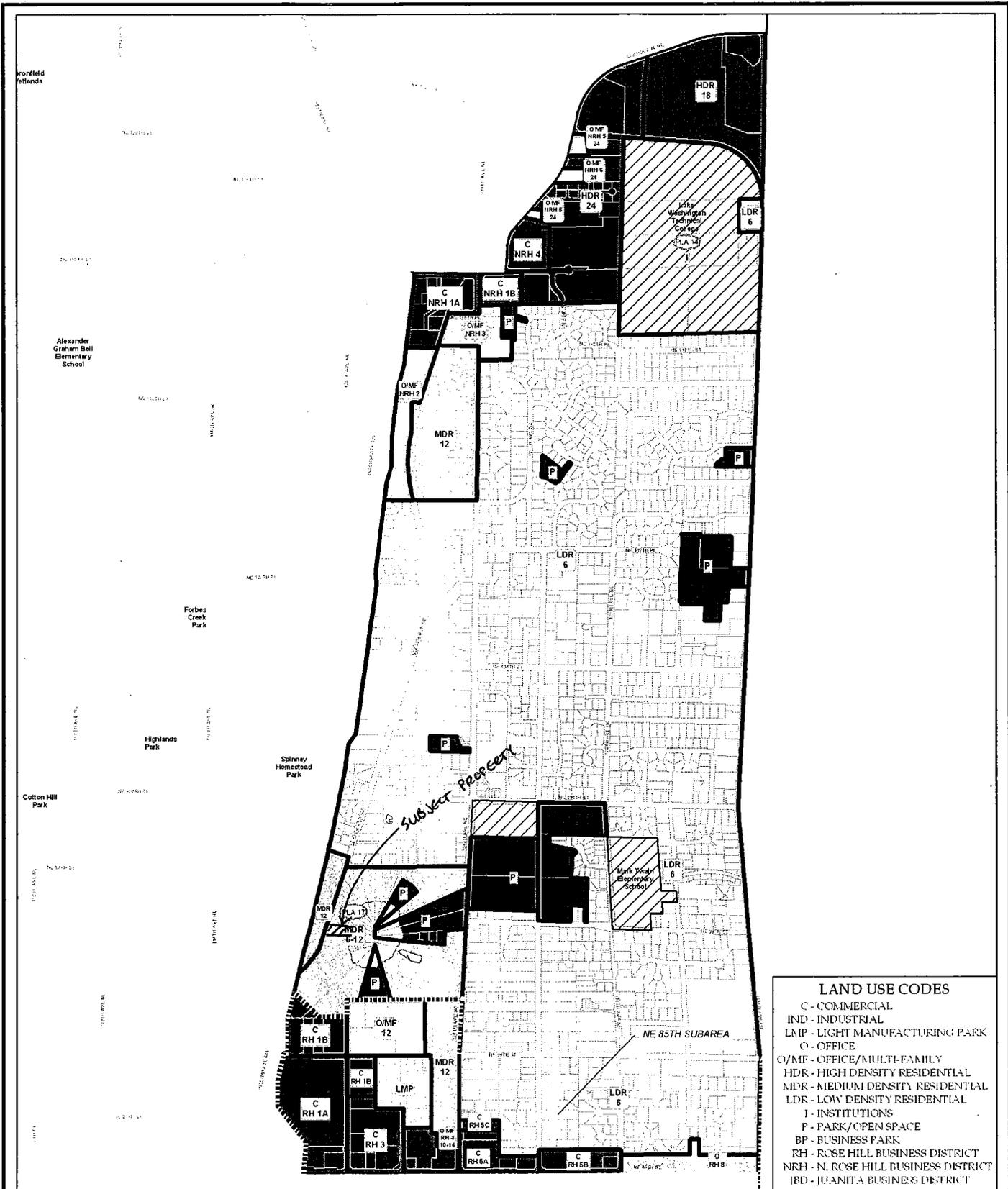


[Signature]
SIGNATURE

Notary
TITLE

My appointment expires 6/11/07

ACKNOWLEDGEMENT - REPRESENTATIVE
Form 5999 (Rev 8-88)



LAND USE CODES

- C - COMMERCIAL
- IND - INDUSTRIAL
- LMP - LIGHT MANUFACTURING PARK
- O - OFFICE
- O/MF - OFFICE/MULTI-FAMILY
- HDR - HIGH DENSITY RESIDENTIAL
- MDR - MEDIUM DENSITY RESIDENTIAL
- LDR - LOW DENSITY RESIDENTIAL
- I - INSTITUTIONS
- F - PARK/OPEN SPACE
- BP - BUSINESS PARK
- RH - ROSE HILL BUSINESS DISTRICT
- NRH - N. ROSE HILL BUSINESS DISTRICT
- JD - JUANITA BUSINESS DISTRICT

North Rose Hill Neighborhood Land Use Map

ORDINANCE NO. 3974
ADOPTED by the Kirtland City Council
December 14, 2004

LAND USE BOUNDARIES	PUBLIC FACILITIES
PLANNED AREA NUMBER	PARCEL BOUNDARIES
SUBAREA BOUNDARY	LAND USE CODE DENSITY (UNITS/ACRE)
TOTEM CENTER	NOTE: WHERE NOT SHOWN, NO INDICATES CLUSTERED

Maps produced March 10, 2005
Produced by the City of Kirtland, © 2005. All rights reserved.
No warranties of any sort, including but not limited to accuracy, fitness or merchantability, accompany d



ATTACHMENT 9
ZONOS-00016

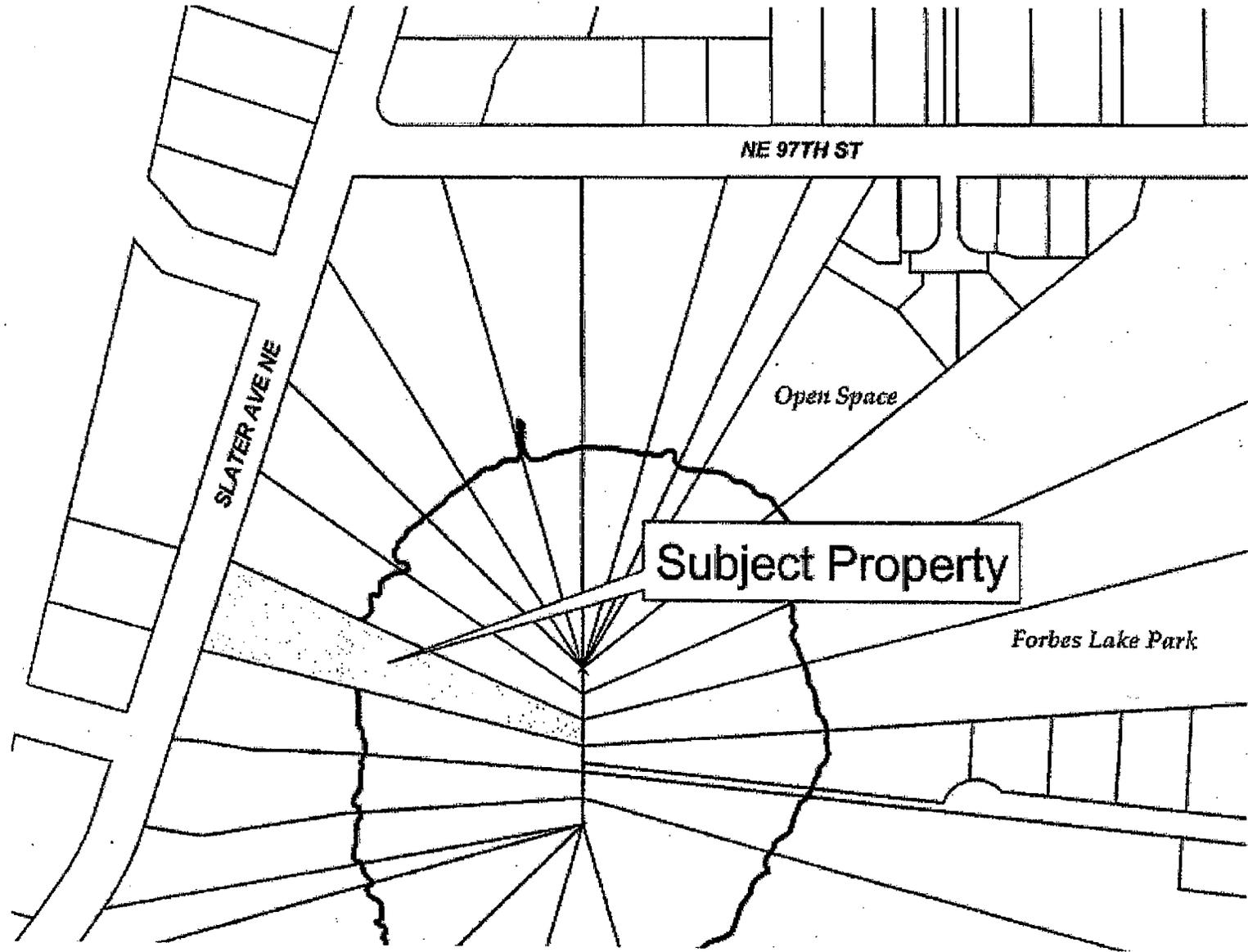
Rosinski Reasonable Use Permit

PCD File No. ZON05-00016
September 1, 2005

EXHIBIT B

HE REC. ZON05-00016

Property Location



Proposal

- A request for approval of a reasonable use permit to allow construction of one single-family residence within a wetland buffer. The proposed single family residence is approximately 3,045 square feet in size and would impact approximately 3,600 square feet of a Type I wetland buffer.
- Review Process: Process IIB, Hearing Examiner conducts public hearing and makes recommendation; City Council makes final decision.

Chapter 90: Drainage Basin Regulations

- Wetland buffers serve to moderate runoff volume and flow rates; reduce sediment loads; remove waterborne contaminants such as excess nutrients, synthetic organic chemicals (e.g., pesticides, oils, and greases), and metals; provide shade for surface water temperature moderation; provide wildlife habitat; and deter harmful intrusion into wetlands.
- The primary purpose of wetland regulations is to achieve a goal of no net loss of wetland function, value, and acreage within each drainage basin, which, where possible, includes enhancing and restoring wetlands.

Comprehensive Plan

- Goal NE-1: Protect natural systems and features from the potentially negative impacts of human activities, including, but not limited to, land development
- Goal NE-2: Manage the natural and built environments to achieve no net loss of the functions and values of each drainage basin; and, where possible, to enhance and restore functions, values, and features. Retain lakes, ponds, wetlands, and streams and their corridors substantially in their natural condition.

KZC Section 90.140- Determination Criteria

- No permitted land use with less impact
- No onsite alternative with less impact
- Minimum feasible alteration or impairment of the sensitive area.

Staff Conclusions

- SFR use is the least intensive use allowed on subject property based on zoning
 - Proposed location is feasible and reasonable
 - Proposal, with the incorporation of The Watershed Company's recommendations, would result in minimum feasible alteration of the sensitive area.
-

KZC Section 90.140- Consideration Criteria

Inability to derive reasonable use is the result of the applicant's actions.

- Staff concludes that the subject property was created legally, thus the inability to derive reasonable use is not a result of the applicant's actions.

KZC Section 90.140- Consideration Criteria

The land use and environmental regulations which prevent reasonable use of the property were in effect at the time of purchase of the property by the applicant.

- The existing Chapter 90 regulations were adopted in April of 2002.
 - Mr. Rosinski purchased the property in July of 2004 for \$22,000 according to KC Records.
-

TO WHOM IT MAY CONCERN:

This is to certify that at the time of our purchase and sale agreement the property was unbuildable. Therefore the sales price is a reflection of that and is our true sales price of \$22,000.00.

Dated this 8 day of July, 2004

CLI-LLC
CLI-LLC

Charles B. Rosinski
Charles B. Rosinski

Keith A. Gosney
Keith A. Gosney

Kimiko Gosney
Kimiko Gosney

Staff Conclusions

- The applicant purchased the property after adoption of the current regulations.
 - The applicant certified that the property was unbuildable and the price he paid reflects this fact.
 - Staff assumes that the conditions on the property have not changed and that the property is still unbuildable.
-

Staff Recommendation

- Based on the information presented, Staff concludes that the proposed reasonable use application should be denied based on the fact that the applicant knew the property was unbuildable when he purchased the property.
-

Charles B. Rosinski
P.O. Box 5000-139
Duvall, WA 98019

September 1, 2005

City of Kirkland Hearing Examiner
123 Fifth Avenue
Kirkland, WA 98033

Re: Rosinski Reasonable Use Permit (ZON05-00016)
Hearing Date and Place: September 1, 2005; 7:00 p.m.
City of Kirkland – City Hall Council Chamber
123 Fifth Avenue, Kirkland, WA

Dear Hearing Examiner:

I am the applicant for the above-referenced reasonable use permit. This letter is submitted to clarify and challenge factual inaccuracies, flawed assumptions, and misinformation contained in the Advisory Report, Findings, Conclusions, and Recommendations (“Advisory Report”) dated August 25, 2005, issued by the City of Kirkland Planning and Community Development Department (“Planning Department”) on this matter. Additional detail will also be submitted by my testimony at the hearing of the matter.

SUMMARY

I absolutely object to and challenge the Planning Department’s recommendation of denial of my application for a reasonable use permit and respectfully request that the Hearing Examiner recommend approval. As reflected in my legal counsel’s letter dated April 28, 2005 (Advisory Report, Attachment 6), the Wetland Resources, Inc. report (Advisory Report, Attachment 5), the Watershed Company report (Advisory Report, Attachment 7), and the Advisory Report itself, my project clearly meets all reasonable use criteria established by the City of Kirkland Zoning Code (“KZC”) 90.140. In fact, the Planning Department’s specifically concludes that:

- (1) **The proposed single family use is the least intensive use that is allowed for the subject property. There is no other permitted type of land use for the property that would have a lesser impact on the wetland and associated buffer.**
- (2) **Within the amount of wetland and buffer area on the subject property, the proposed location of the single-family residence is feasible and reasonable.**

EXHIBIT <u>C</u>
HE REC. ZON05-00016

- (3) **The proposal, as conditioned with the incorporation of the recommendations made by The Watershed Company, would result in minimum feasible alteration of or impairment to the functional characteristics of the sensitive areas, and their existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and will not cause significant degradation of groundwater or surface-water quality.**

(Emphasis added.)(Advisory Report, p. 5)

The recommended "rejection" of the permit by the Planning Department based solely on the timing of my purchase of the property, however, relies on inaccurate information, misinterpretation of the KZC, and would preclude any and all use of my property causing severe financial loss.

THE WATERSHED COMPANY RECOMMENDATIONS

I have no objection to including the recommendations contained in The Watershed Report (Advisory Report, Attachment 7, p.3) as conditions of permit approval. To the extent that the recommendations require that I increase the total number of installed plants (item 4), propose more trees (item 5), propose to amend soils across the mitigation site (item 6), or other items requiring further review, I have no objection to adhering to the Watershed Company's recommendations following their review of any such proposals.

FACTUAL CHRONOLOGY

The following factual chronology provides the pertinent history of my acquisition and attempts to obtain permit approval for my property.

July 9, 2000: My then spouse, Jayne K. Morse, entered into a written agreement to purchase the property from Keith and Kimiko Gosney for \$30,000. (See, attached Exhibit A.) The payment terms were subsequently modified due to the Gosneys' interest in and acquisition of property in 2001 owned by Ms. Morse and located in Gold Bar. (See, attached Exhibits B, C.) The price was later reduced by \$8,000 to a total of \$22,000 based on a similar \$8,000 reduction in the price of the Gold Bar property sold to the Gosneys. (See, attached Exhibits B, C.) A deed of trust was also executed by Ms. Morse in April, 2001, secured by the property for payment of the purchase price of \$22,000. (See, attached Exhibit A.)

Under the agreement, title was to remain in the Gosneys until payment was made in full, a building permit obtained, or at five years. (See, attached Exhibit A.) The Gosneys' subsequently confirmed on March 12, 2003 that title would be transferred to Ms. Morse before the end of 2004, or any time before then at her discretion. (See, attached Exhibit E.) As a result of my divorce from Ms. Morse in 2004, I ended up with her interest in the property.

At the time that this agreement and purchase price was agreed upon, the property was unbuildable since bringing sewer to the property was cost-prohibitive and it was unknown when this situation would change. This was the reason that the real estate tax excise affidavit executed in July, 2004 (see, Advisory Report, Attachment 8) states that "[t]his is to certify that at the time of our purchase and sale agreement the property was unbuildable. Therefore the sales price is a reflection of that and is our true sales price of \$22,000." This certification did not relate to any potential wetland buffer problems since I was not aware of any "unbuildable" problems related to wetland restrictions in 2000-2001 when the purchase price was established.

December, 2002: I met with Tony Leavitt (Planner) with the Planning Department for the first time. We discussed how to proceed and he recommended a "wetland buffer modification" instead of a "reasonable use exception" due to the fact that a buffer modification would be easier. At no time, did he indicate that the time of my acquisition of the property was an issue under either a "wetland buffer modification" or a "reasonable use exception."

February 18, 2003: I met with and later retained Wetland Resources, Inc. to prepare a buffer modification plan for \$2,000.

August 20, 2003: I received a buffer modification plan from Wetland Resources, Inc.

December 8, 2003: Mr. Leavitt submits letter to Capital Resource Group, my lender, stating a wetland buffer modification is "viable option for Mr. Rosinski to allow for the construction of a single-family residence." (See, attached Exhibit F.) Certainly, at the time, Mr. Leavitt was well aware of how far I planned on extending into the buffer.

December 11, 2003: Based on Mr. Leavitt's assurances, I submitted a buffer modification plan to Mr. Leavitt, along with a check for \$1,036.00 for a review of my proposal by their wetland consulting firm, Adolfson Associates.

December 15, 2003: I signed an agreement with City of Kirkland for wetland study review by Adolfson Associates.

January 21, 2004: I received a review letter from Adolfson which doesn't make mention of any major problems with my plan and so I proceeded with preparation of the formal application.

August 6, 2004: I met with Mr. Leavitt to review progress of my application, get information on "resident labels" needed for my application, and submitted my formal application along with a check for \$5,510.00. (See, attached Exhibits G, H.)

September 15, 2004: I received a letter from Mr. Leavitt stating that my application was

complete and that I should have a decision within 120 days.

December 2, 2004: I provided the City with a check for \$1,407.50 for another review of my buffer modification plan by the City's consultant.

December 15, 2004: I received word from Mr. Leavitt abruptly reversing his position, claiming that a wetland buffer modification will not work, and that he was consulting with the city attorney on how to proceed.

January 12, 2005: Mr. Leavitt sends a letter to my legal counsel indicating that since the proposed modification extends into the buffer by more than one-third, that it would be in violation of the KZC and that the Planning Department would reject the application if pursued. (See, attached Exhibit I.) Again, Mr. Leavitt was aware of this for months and yet continued to encourage me to pursue a buffer modification.

April 28, 2005: Having no other choice, I was forced to file a reasonable use application of the property. (See attached Exhibit J.) The Planning Department's form application made no inquiry as to the timing of the acquisition of the property or that this was even an issue. Nor did Mr. Leavitt ever indicate to me that the date of my acquisition of the property was somehow determinative of approval of the application. The first time this issue was even raised was when I received the Advisory Report.

REASONABLE USE PERMIT SHOULD BE GRANTED

The only reason for denial raised by the Planning Department relates to the requirement in KCZ 90.140 that the Hearing Examiner consider the following in determining reasonable use:

1. The inability to derive reasonable use is the result of the applicant's actions, such as segregating or dividing property and creating the undevelopable condition, or taking actions in violation of any local, state, or federal law or regulation; and
2. The land use and environmental regulations which prevent reasonable use of the property were in effect at the time of purchase of the property by the applicant.

However, the purchase of the property occurred in 2000 by my ex-spouse, which was well before the implementation of the "current Sensitive Area Regulations (Zoning Code Chapter) which were adopted in April of 2002." (See, Advisory Report, p. 5-6, ¶2(a)(4).) Although I received the property in 2004, it was a result of a divorce settlement and I certainly had no role in "segregating or dividing property and creating the undevelopable condition, or taking actions in violation of any local, state, or federal law or regulation."

Moreover, there is absolutely nothing in the code that requires that the application must be denied if the "land use and environmental regulations which prevent reasonable use of the property were in effect at the time of purchase of the property by the applicant." Rather, this factor **and** the "inability to derive reasonable use is the result of the applicant's actions, such as segregating or dividing property and creating the undevelopable condition, or taking actions in violation of any local, state, or federal law or regulations" must **both** be present for the Hearing Examiner to consider this as factor in recommending denial. Further, even if they are both present, these are simply factors that should be considered. They do not necessarily and absolutely preclude approval of reasonable use.

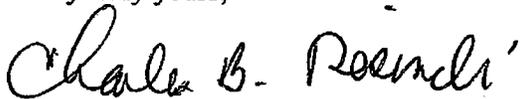
As reflected in my legal counsel's letter, dated April 28, 2005 (Advisory Report, Attachment 6) (see, attached Exhibit J), the Wetland Resources, Inc. report (Advisory Report, Ex. J Attachment 5), the Watershed Company report (Advisory Report, Ex J Attachment 7), and the Advisory Report itself, the essential criteria for reasonable use have been met, i.e., there is no other permitted type of land use for the property that would have a lesser impact; the buffer is feasible and reasonable; no on-site alternative to the proposal is feasible and reasonable; and the proposal, as conditioned, will result in a minimum feasible alteration or impairment to the functional characteristics of the sensitive areas and will not cause significant degradation of groundwater or surface-water quality.

Finally, denial of reasonable use would completely deprive me of any and all use of the property, the property will lose all economic value, and it will remain vacant and un-useable property. This is certainly not a good or practical use of the property and the very reason why "reasonable use" exception exists.

CONCLUSION

I therefore respectfully request that the Hearing Examiner recommend approval of Reasonable Use Permit (ZON05-00016). Thank you for your consideration of this very important matter.

Very truly yours,



Charles B. Rosinski

July 9, 2000

Charlie,

Land purchase proposal for lot 5.

Price \$30,000 including back-rent owed for other lot

Down payment \$5000. Payments at \$300 per month, with balloon payment 3 months after building permit is obtained or at 5 years, whichever is sooner. Interest will accrue at 7.75% annual rate, compounded monthly.

Payments are to be received by the fifth of each month. Late fee of \$2 per day beginning on the sixth day of the month and each day thereafter. Late fees do not apply towards principle. If your payments become four months overdue, then all money previously paid will be considered to be rent and this purchase agreement will be terminated.

Purchaser must pay all taxes in timely manner. Purchaser is responsible for any liability issues. No oil or other hazardous material is allowed on property. If purchase is not completed, then purchaser will restore the property to its present condition. No lienable work may be done unless lien release is obtained prior to work beginning.

Title will stay in our name until payment is completed when building permit is obtained or at 5 years. You will pay time and costs to obtain building permit. We will make reasonable efforts to assist you to obtain building permit.

You will pay your lawyer to draw up agreement. Down payment will be due August 1, 2000, and the first payment due by September 5, 2000.

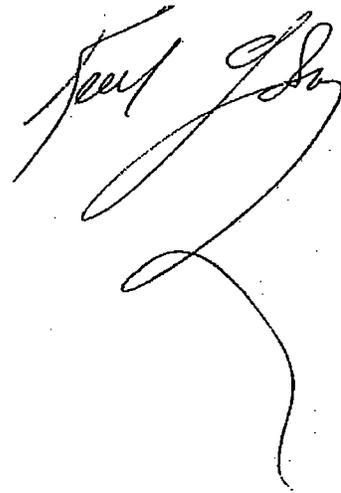


EXHIBIT A

AGREEMENT TO SELL REAL ESTATE

Jayne K. Morse of 16811 219th Pl SE Marrow Wa 98272 as Seller, and Keith A. & Kimiko Gasney of 10014 Rainier Ave S, Seattle Wa 98178 as Buyer, hereby agree that the Seller shall sell and the Buyer shall buy the following described property UPON THE TERMS AND CONDITIONS HEREINAFTER SET FORTH, which shall include the STANDARDS FOR REAL ESTATE TRANSACTIONS set forth within this contract.

1. LEGAL DESCRIPTION of real estate located in Gold Bar Shahamish County, State of wa
Lot #2 of Gov Lot 3, Sec 14 Twnshp 27 N Range 9 E, W.M.

2. PURCHASE PRICE ~~55,000~~ 47,000 Dollars. Method of Payment: Check

(a) Deposit to be held in trust by _____ \$ N/A
 (b) Approximate principal balance of first mortgage to which conveyance shall be subject, if any, Mortgage holder: _____ \$ N/A
 Interest _____ % per annum; Method of payment _____
 (c) Other: Deed of Trust \$ 30,000.00
 (d) Cash, certified or local cashier's check on closing and delivery of deed (or such greater or lesser amount as may be necessary to complete payment of purchase price after credits, adjustments and prorations) \$ 17,000.00
~~25,000.00~~

3. PRORATIONS: Taxes, insurance, interest, rents and other expenses and revenue of said property shall be prorated as of the date of closing.

4. RESTRICTIONS, EASEMENTS, LIMITATIONS: Buyer shall take title subject to: (a) Zoning, restrictions, prohibitions and requirements imposed by governmental authority, (b) Restrictions and matters appearing on the plat or common to the subdivision, (c) Public utility easements of record, provided said easements are located on the side or rear lines of the property, (d) Taxes for year of closing, assumed mortgages, and purchase money mortgages, if any, (e) Other: Separate easements tabs provided and agreed prior to closing. Seller warrants that there shall be no violations of building or zoning codes at the time of closing.

5. DEFAULT BY BUYER: If Buyer fails to perform any of the covenants of this contract, all money paid pursuant to this contract by Buyer as aforesaid shall be retained by or for the account of the Seller as consideration for the execution of this contract and as agreed liquidated damages and in full settlement of any claims for damages.

6. DEFAULT BY SELLER: If the Seller fails to perform any of the covenants of this contract, the aforesaid money paid by the Buyer, at the option of the Buyer, shall be returned to the Buyer on demand; or the Buyer shall have only the right of specific performance.

7. TERMITE INSPECTION: At least 15 days before closing, Buyer, at Buyer's expense, shall have the right to obtain a written report from a licensed exterminator stating that there is no evidence of live termite or other wood-boring insect infestation on said property nor substantial damage from prior infestation on said property. If there is such evidence, Seller shall pay up to three (3%) percent of the purchase price for the treatment required to remedy such infestation, including repairing and replacing portions of said improvements which have been damaged; but if the costs for such treatment or repairs exceed three (3%) percent of the purchase price, Buyer may elect to pay such excess. If Buyer elects not to pay, Seller may pay the excess or cancel the contract.

8. ROOF INSPECTION: At least 15 days before closing, Buyer, at Buyer's expense, shall have the right to obtain a written report from a licensed roofer stating that the roof is in a watertight condition. In the event repairs are required either to correct leaks or to replace damaged fascia or soffit, Seller shall pay up to three (3%) percent of the purchase price for said repairs which shall be performed by a licensed roofing contractor; but if the costs for such repairs exceed three (3%) percent of the purchase price, Buyer may elect to pay such excess. If Buyer elects not to pay, Seller may pay the excess or cancel the contract.

9. OTHER INSPECTIONS: At least 15 days before closing, Buyer or his agent may inspect all appliances, air conditioning and heating systems, electrical systems, plumbing, machinery, sprinklers and pool system included in the sale. Seller shall pay for repairs necessary to place such items in working order at the time of closing. Within 48 hours before closing, Buyer shall be entitled, upon reasonable notice to Seller, to inspect the premises to determine that said items are in working order. All items of personal property included in the sale shall be transferred by Bill of Sale with warranty of title.

Handwritten notes:
 3/10/01
 done by
 2/28/01
 [Signature]

B
EXHIBIT



10. LEASES: Seller, not less than 15 days before closing, shall furnish to Buyer copies of all written leases and estoppel letters from each tenant specifying the nature and duration of the tenant's occupancy, rental rates and advanced rent and security deposits paid by tenant. If Seller is unable to obtain such letters from tenants, Seller shall furnish the same information to Buyer within said time period in the form of a seller's affidavit, and Buyer may contact tenants thereafter to confirm such information. At closing, seller shall deliver and assign all original leases to Buyer.

11. MECHANICS LIENS: Seller shall furnish to Buyer an affidavit that there have been no improvements to the subject property for 90 days immediately preceding the date of closing, and no financing statements, claims of lien or potential lienors known to Seller. If the property has been improved within that time, Seller shall deliver releases or waivers of all mechanics liens as executed by general contractors, subcontractors, suppliers and materialmen, in addition to the seller's lien affidavit, setting forth the names of all general contractors, subcontractors, suppliers and materialmen and reciting that all bills for work to the subject property which could serve as basis for mechanics liens have been paid or will be paid at closing time.

12. PLACE OF CLOSING: Closing shall be held at the office of the Seller's attorney or as otherwise agreed upon.

13. TIME IS OF THE ESSENCE: Time is of the essence of this Sale and Purchase Agreement.

14. DOCUMENTS FOR CLOSING: Seller's attorney shall prepare deed, note, mortgage, Seller's affidavit, any corrective instruments required for perfecting the title, and closing statement and submit copies of same to Buyer's attorney, and copy of closing statement to the broker, at least two days prior to scheduled closing date.

15. EXPENSES: State documentary stamps required on the instrument of conveyance and the cost of recording any corrective instruments shall be paid by the Seller. Documentary stamps to be affixed to the note secured by the purchase money mortgage, intangible tax on the mortgage, and the cost of recording the deed and purchasing money mortgage shall be paid by the Buyer.

16. INSURANCE: If insurance is to be prorated, the Seller shall on or before the closing date, furnish to Buyer all insurance policies or copies thereof.

17. RISK OF LOSS: If the improvements are damaged by fire or casualty before delivery of the deed and can be restored to substantially the same condition as now within a period of 60 days thereafter, Seller shall so restore the improvements and the closing date and date of delivery of possession hereinbefore provided shall be extended accordingly. If Seller fails to do so, the Buyer shall have the option of (1) taking the property as is, together with insurance proceeds, if any, or (2) cancelling the contract, and all deposits shall be forthwith returned to the Buyer and all parties shall be released of any and all obligations and liability.

18. MAINTENANCE: Between the date of the contract and the date of closing, the property, including lawn, shrubbery and pool, if any, shall be maintained by the Seller in the condition as it existed as of the date of the contract, ordinary wear and tear excepted.

19. CLOSING DATE: This contract shall be closed and the deed and possession shall be delivered on or before the 15th day of March 2001 (year), unless extended by other provisions of this contract.

20. TYPEWRITTEN OR HANDWRITTEN PROVISIONS: Typewritten or handwritten provisions inserted in this form shall control all printed provisions in conflict therewith.

21. OTHER AGREEMENTS: No agreements or representations, unless incorporated in this contract, shall be binding upon any of the parties.

22. RADON GAS DISCLOSURE. As required by law, (Landlord) (Seller) makes the following disclosure: "Radon Gas" is a naturally occurring radioactive gas that, when it has accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in _____ . Additional information regarding radon and radon testing may be obtained from your county public health unit.

23. LEAD PAINT DISCLOSURE. "Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real estate is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspection in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase."

24. SPECIAL CLAUSES:

COMMISSION TO BROKER: The Seller hereby recognizes _____ as the Broker in this transaction, and agrees to pay as commission _____ % of the gross sales price, the sum of _____ Dollars (\$ _____) or one-half of the deposit in case same is forfeited by the Buyer through failure to perform, as compensation for services rendered, provided same does not exceed the full amount of the commission.

WITNESSED BY:

Charles C. Roselli 3/1/01
Witness Date

~~Witness~~ *[Signature]* 3/1/01
Date

Seller

Keith Gorm 3/1/01
Buyer Date

~~Seller~~ *[Signature]* 2/28/01
Date

Charles Roselli - Witness

A120-10
R120-04

AGREEMENT TO SELL REAL ESTATE

Jayne K Mons of
16811 219th Pl SE Monroe, WA 98222 as Seller, and
Keith B. & Kimilco Ganey of
10024 Rainier Ave S, Seattle, WA 98178 as Buyer, hereby agree that
 the Seller shall sell and the Buyer shall buy the following described property UPON THE TERMS AND CONDI-
 TIONS HEREBINAFTER SET FORTH, which shall include the STANDARDS FOR REAL ESTATE TRANSAC-
 TIONS set forth within this contract.

1. LEGAL DESCRIPTION of real estate located in Gold Bar
Shohamish County, State of WA.

Lot #2 of Gov. Lot 3, Sec. 14 Township 27N Range 9E, W/M

2. PURCHASE PRICE 47,000.00 Dollars. Method of Payment: check

(a) Deposit to be held in trust by _____ \$ N/A

(b) Approximate principal balance of first mortgage to which conveyance shall be subject, if any, Mortgage holder: _____ \$ N/A
 Interest _____ % per annum; Method of payment _____

(c) Other: Deed or Trust \$ 23,000.00

(d) Cash, certified or local cashier's check on closing and delivery of deed (or such greater or lesser amount as may be necessary to complete payment of purchase price after credits, adjustments and prorations). \$ 24,000.00

3. PRORATIONS: Taxes, insurance, interest, rents and other expenses and revenue of said property shall be pro-rated as of the date of closing.

4. RESTRICTIONS, EASEMENTS, LIMITATIONS: Buyer shall take title subject to: (a) Zoning, restrictions, prohibitions and requirements imposed by governmental authority, (b) Restrictions and matters appearing on the plat or common to the subdivision, (c) Public utility easements of record, provided said easements are located on the side or rear lines of the property, (d) Taxes for year of closing, assumed mortgages, and purchase money mortgages, if any, (e) Other: Separate easements to be reviewed + agreed prior to closing. Seller warrants that there shall be no violations of building or zoning codes at the time of closing.

5. DEFAULT BY BUYER: If Buyer fails to perform any of the covenants of this contract, all money paid pursuant to this contract by Buyer as aforesaid shall be retained by or for the account of the Seller as consideration for the execution of this contract and as agreed liquidated damages and in full settlement of any claims for damages.

6. DEFAULT BY SELLER: If the Seller fails to perform any of the covenants of this contract, the aforesaid money paid by the Buyer, at the option of the Buyer, shall be returned to the Buyer on demand; or the Buyer shall have only the right of specific performance.

7. TERMITE INSPECTION: At least 15 days before closing, Buyer, at Buyer's expense, shall have the right to obtain a written report from a licensed exterminator stating that there is no evidence of live termite or other wood-boring insect infestation on said property nor substantial damage from prior infestation on said property. If there is such evidence, Seller shall pay up to three (3%) percent of the purchase price for the treatment required to remedy such infestation, including repairing and replacing portions of said improvements which have been damaged; but if the costs for such treatment or repairs exceed three (3%) percent of the purchase price, Buyer may elect to pay such excess. If Buyer elects not to pay, Seller may pay the excess or cancel the contract.

8. ROOF INSPECTION: At least 15 days before closing, Buyer, at Buyer's expense, shall have the right to obtain a written report from a licensed roofer stating that the roof is in a watertight condition. In the event repairs are required either to correct leaks or to replace damage to fascia or soffit, Seller shall pay up to three (3%) percent of the purchase price for said repairs which shall be performed by a licensed roofing contractor; but if the costs for such repairs exceed three (3%) percent of the purchase price, Buyer may elect to pay such excess. If Buyer elects not to pay, Seller may pay the excess or cancel the contract.

9. OTHER INSPECTIONS: At least 15 days before closing, Buyer or his agent may inspect all appliances, air conditioning and heating systems, electrical systems, plumbing, machinery, sprinklers and pool system included in the sale. Seller shall pay for repairs necessary to place such items in working order at the time of closing. Within 48 hours before closing, Buyer shall be entitled, upon reasonable notice to Seller, to inspect the premises to determine that said items are in working order. All items of personal property included in the sale shall be transferred by Bill of Sale with warranty of title.



0 53926 20005 4

10. LEASES: Seller, not less than 15 days before closing, shall furnish to Buyer copies of all written leases and estoppel letters from each tenant specifying the nature and duration of the tenant's occupancy, rental rates and advanced rent and security deposits paid by tenant. If Seller is unable to obtain such letters from tenants, Seller shall furnish the same information to Buyer within said time period in the form of a seller's affidavit, and Buyer may contact tenants thereafter to confirm such information. At closing, seller shall deliver and assign all original leases to Buyer.

11. MECHANICS LIENS: Seller shall furnish to Buyer an affidavit that there have been no improvements to the subject property for 90 days immediately preceding the date of closing, and no financing statements, claims of lien or potential lienors known to Seller. If the property has been improved within that time, Seller shall deliver releases or waivers of all mechanics liens as executed by general contractors, subcontractors, suppliers and materialmen, in addition to the seller's lien affidavit, setting forth the names of all general contractors, subcontractors, suppliers and materialmen and reciting that all bills for work to the subject property which could serve as basis for mechanics liens have been paid or will be paid at closing time.

12. PLACE OF CLOSING: Closing shall be held at the office of the Seller's attorney or as otherwise agreed upon.

13. TIME IS OF THE ESSENCE: Time is of the essence of this Sale and Purchase Agreement.

14. DOCUMENTS FOR CLOSING: Seller's attorney shall prepare deed, note, mortgage, Seller's affidavit, any corrective instruments required for perfecting the title, and closing statement and submit copies of same to Buyer's attorney, and copy of closing statement to the broker, at least two days prior to scheduled closing date.

15. EXPENSES: State documentary stamps required on the instrument of conveyance and the cost of recording any corrective instruments shall be paid by the Seller. Documentary stamps to be affixed to the note secured by the purchase money mortgage, intangible tax on the mortgage, and the cost of recording the deed and purchasing money mortgage shall be paid by the Buyer.

16. INSURANCE: If insurance is to be prorated, the Seller shall on or before the closing date, furnish to Buyer all insurance policies or copies thereof.

17. RISK OF LOSS: If the improvements are damaged by fire or casualty before delivery of the deed and can be restored to substantially the same condition as now within a period of 60 days thereafter, Seller shall so restore the improvements and the closing date and date of delivery of possession hereinbefore provided shall be extended accordingly. If Seller fails to do so, the Buyer shall have the option of (1) taking the property as is, together with insurance proceeds, if any, or (2) cancelling the contract, and all deposits shall be forthwith returned to the Buyer and all parties shall be released of any and all obligations and liability.

18. MAINTENANCE: Between the date of the contract and the date of closing, the property, including lawn, shrubbery and pool, if any, shall be maintained by the Seller in the condition as it existed as of the date of the contract, ordinary wear and tear excepted.

19. CLOSING DATE: This contract shall be closed and the deed and possession shall be delivered on or before the 14th day of April, 2001 (year), unless extended by other provisions of this contract.

20. TYPEWRITTEN OR HANDWRITTEN PROVISIONS: Typewritten or handwritten provisions inserted in this form shall control all printed provisions in conflict therewith.

21. OTHER AGREEMENTS: No agreements or representations, unless incorporated in this contract, shall be binding upon any of the parties.

22. RADON GAS DISCLOSURE. As required by law, (Landlord) (Seller) makes the following disclosure: "Radon Gas" is a naturally occurring radioactive gas that, when it has accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in [redacted]. Additional information regarding radon and radon testing may be obtained from your county public health unit.

23. LEAD PAINT DISCLOSURE. "Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real estate is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspection in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase."

24. SPECIAL CLAUSES:

11/1 % of the gross sales price, the sum of _____ Dollars (\$) or one-half of the deposit in case same is forfeited by the Buyer through failure to perform, as compensation for services rendered, provided same does not exceed the full amount of the commission.

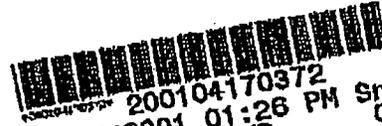
WITNESSED BY:

Witness _____ Date _____
Charles B. [Signature] 3/27/01
Witness _____ Date _____

Buyer _____ Date _____
[Signature] 3/27/01
Seller _____ Date _____

WHEN RECORDED RETURN TO

Name Jayne Kingsley Morse
Address 16811 - 219th Pl S E
City, State, Zip Monroe, WA 98272



04/17/2001 01:26 PM
P.0005 RECORDED
Snohomish County

RECORDER'S NOTE
PORTIONS OF THIS DOCUMENT
ARE POOR QUALITY FOR SCANNING.

200104170372

Deed of Trust

(For Use in the State of Washington Only)

THIS DEED OF TRUST, made this day of 2001, between KEITH ALLEN GOSNEY and KIMKO GOSNEY, husband and wife, GRANTOR, whose address is 10024 Rainier Ave. S., Seattle, WA 98178, CHICAGO TITLE INSURANCE COMPANY, a corporation, TRUSTEE, whose address is 1700 Columbia Center, 701 Fifth Avenue, Seattle, Washington 98104 and JAYNE KINGSLEY MORSE, a married woman as her separate property, BENEFCIARY, whose address is 16811 - 219th Pl S E, Monroe, Washington 98272, WITNESSETH Grantor hereby bargains, sells and conveys to Trustee in Trust, with power of sale, the following described real property in King County, Washington:

SEE EXHIBIT "A" ATTACHED HERETO AND INCORPORATED HEREIN



Situated in the County of King, State of Washington
Abbreviated Legal. Lot 5, ^{Block} ~~Block~~ 43, Burke-Farrar's Kirkland Addition, Division No 14
Tax Account Number 123805-0685-03.

which real property is not used principally for agricultural or farming purposes, together with all the tenements, hereditaments, and appurtenances now or hereafter thereto belonging or in any wise appertaining, and the rents, issues and profits thereof.

This deed is for the purpose of securing performance of each agreement of grantor herein contained, and payment of the sum of Twenty Two Thousand and 00/100s Dollars (\$22,000.00) with interest, in accordance with the terms of a promissory note of even date herewith, payable to Beneficiary or order, and made by Grantor, and all renewals, modifications and extensions thereof, and also such further sums as may be advanced or loaned by Beneficiary to Grantor,

EXHIBIT D

or any of their successors or assigns, together with interest thereon at such rate as shall be agreed upon

To protect the security of this Deed of Trust, Grantor covenants and agrees.

1. To keep the property in good condition and repair; to permit no waste thereof; to complete any building, structure or improvement being built or about to be built thereon; to restore promptly any building, structure or improvement thereon which may be damaged or destroyed, and to comply with all laws, ordinances, regulations, covenants, conditions and restrictions affecting the property.

2. To pay before delinquent all lawful taxes and assessments upon the property; to keep the property free and clear of all other charges, liens or encumbrances impairing the security of this Deed of Trust.

3. To keep all buildings now or hereafter erected on the property described herein continuously insured against loss by fire or other hazards in an amount not less than the total debt secured by this Deed of Trust. All policies shall be held by the Beneficiary, and be in such companies as the Beneficiary may approve and have loss payable first to the Beneficiary, as its interest may appear, and then to the Grantor. The amount collected under any insurance policy may be applied upon any indebtedness hereby secured in such order as the Beneficiary shall determine. Such application by the Beneficiary shall not cause discontinuance of any proceedings to foreclose this Deed of Trust. In the event of foreclosure, all rights of the Grantor in insurance policies then in force shall pass to the purchaser at the foreclosure sale.

4. To defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee, and to pay all costs and expenses, including cost of title search and attorney's fees in a reasonable amount, in any such action or proceeding, and in any suit brought by Beneficiary to foreclose this Deed of Trust.

5. To pay all costs, fees and expenses in connection with this Deed of Trust, including the expenses of the Trustee incurred in enforcing the obligation secured hereby and Trustee's and attorney's fees actually incurred, as provided by statute.

6. Should Grantor fail to pay when due any taxes, assessments, insurance premiums, liens, encumbrances or other charges against the property hereinabove described, Beneficiary may pay the same, and the amount so paid, with interest at the rate set forth in the note secured hereby, shall be added to and become a part of the debt secured in this Deed of Trust.

IT IS MUTUALLY AGREED THAT

1. In the event any portion of the property is taken or damaged in an eminent domain proceeding, the entire amount of the award or such portion as may be necessary to fully satisfy the obligation secured hereby, shall be paid to Beneficiary to be applied to said obligation.

2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive its right to require prompt payment when due of all other sums so secured or to declare default for failure to so pay

3. The Trustee shall reconvey all or any part of the property covered by this Deed of Trust to the person entitled thereto on written request of the Grantor and the Beneficiary, or upon satisfaction of the obligation secured and written request for reconveyance made by the Beneficiary or the person entitled thereto.

200104170872

4. Upon default by Grantor in the payment of any indebtedness secured hereby or in the performance of any agreement contained herein, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In such event and upon written request of Beneficiary, Trustee shall sell the trust property, in accordance with the Deed of Trust Act of the State of Washington, at public auction to the highest bidder. Any person except Trustee may bid at Trustee's sale. Trustee shall apply the proceeds of the sale as follows: (1) to the expense of the sale, including a reasonable Trustee's fee and attorney's fee, (2) to the obligation secured by this Deed of Trust; (3) the surplus, if any, shall be distributed to the persons entitled thereto.

5. Trustee shall deliver to the purchaser at the sale its deed, without warranty, which shall convey to the purchaser the interest in the property which Grantor had or had the power to convey at the time of his execution of this Deed of Trust, and such as he may have acquired thereafter. Trustee's deed shall recite the facts showing that the sale was conducted in compliance with all the requirements of law and of this Deed of Trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchaser and encumbrances for value.

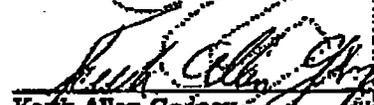
6. The power of sale conferred by this Deed of Trust and by the Deed of Trust Act of the State of Washington is not an exclusive remedy; Beneficiary may cause this Deed of Trust to be foreclosed as a mortgage.

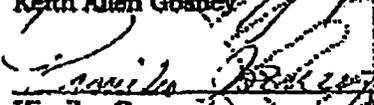
7. In the event of the death, incapacity, disability or resignation of Trustee, Beneficiary may appoint in writing a successor trustee, and upon the recording of such appointment in the mortgage records of the county in which this Deed of Trust is recorded, the successor trustee shall be vested with all powers of the original trustee. The trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Grantor, Trustee or Beneficiary shall be a party unless such action or proceeding is brought by the Trustee.

8. This Deed of Trust applies to and inures to the benefit of, and is binding not only on the parties hereto, but on their heirs, devisees, legatees, administrators, executors and assigns. The term Beneficiary shall mean the holder and owner of the note secured hereby, whether or not named as Beneficiary herein.

9. The Note secured by this Deed of Trust shall at the option of Beneficiary be immediately due and payable upon the sale or other transfer of the property.

10. Removal of timber from the property without the written consent of Grantor shall constitute a default under this Deed of Trust.


Keith Allen Gosney


Kimiko Gosney

200104170372

EXHIBIT "A"

LEGAL DESCRIPTION

**Lot 5, Block 43 of Burke Farrar's Kirkland Addition to the City of Seattle, Division No 14,
as per plat recorded in Volume 20 of Plats, page 14, records of King County**

Situated in the County of King, State of Washington

200104170372⁵

10024 Rainier Ave S.
Seattle, WA 98178
March 12, 2003

To Whom It May Concern:

Re: Lot #5 Burke-Farrars Kirkland Div #14, Kirkland WA

Although this lot remains in our name, Jayne Morse holds a deed of trust on this lot.
Title will be formally transferred to her before the end of 2004, or at any time before then
at her discretion.

Keith A. Gosney
Kimiko Gosney
Keith A. Gosney
Kimiko Gosney

EXHIBIT E



December 8, 2003

David Vintertun
Capital Resource Group
5612 Lake Washington Blvd, Suite 100
Kirkland, WA 98033

Subject: Rosinski Property

Dear Mr. Vintertun:

This letter is regarding the property located at 95xx Slater Avenue NE, tax parcel number 123850-0685, located within the City of Kirkland that Mr. Charlie Rosinski is looking to construct a single-family home on.

Based on my preliminary research, I confirm that the subject property is a "legal building site" as defined by the Kirkland Zoning Code. However the subject property is located near Forbes Lake and an associated Type I (one) Wetland. The size of the wetland on the subject property has been delineated (surveyed) by Wetland Resources, but has yet to be confirmed by the City's wetland consultant. As a result of the delineation, a large portion of the subject property would be impacted by the wetland and its associated buffer.

Based on the work by Wetland Resources, a Wetland Buffer Modification/ Reduction is a viable option for Mr. Rosinski to allow for the construction of one new single-family residence. Kirkland Zoning Code section 90.60 (attached) requires that the application be reviewed through a Process IIA (2A) review. A Process IIA review involves a Planning Director Recommendation and a Hearing Examiner Decision. It is my understanding that Mr. Rosinski plans on applying for this type of application in the near future.

If you have any further questions regarding the information listed above, please do not hesitate to contact me at (425) 576-2907.

Sincerely,

PLANNING AND COMMUNITY DEVELOPMENT

Tony Leavitt
Planner

CC: Notebook
Attachments: KZC 115.80, KZC 90.60

EXHIBIT F

CHARLES B. ROSINSKI
P.O. BOX 5000-139
DUVALL, WA. 98019
425-344-2763
360-805-9546FAX

August 20, 2004

Tony Leavitt
City of Kirkland
Planning and Community Development
123 5th Avenue
Kirkland, Wa. 98033

RE: LOT 5/SLATER AVENUE BUFFER MODIFICATION PLAN

Dear Tony,

I am submitting for your review and for that of the Hearing Examiner a "BUFFER MODIFICATION PLAN" for my lot located on Slater Avenue in the City of Kirkland.

It is my feeling that the proposed plan which was prepared by Wetland Resources, Inc. and reviewed by Adolfsen Assoc., Inc., the City's Consultant at the time, complies with all the applicable criteria set forth in the Zoning Code. The plan complies with the nine conditions set forth by meeting the standards or in most cases improves on the standards. As stated by WRI, "Hydrologic control, water quality, and wildlife habitat within the buffer area will be improved by the proposed buffer enhancement". As can be seen by the report of WRI, the proposed plan greatly increases the functional use of the buffer which in turn protects Forbes Lake from any future pollution.

In closing I also feel that this project follows one of the City of Kirkland's new goals for it "Vision Statement" which "encourages development practices that reduce impacts on the environment".

Thank you for your consideration of my "Buffer Modification Plan".

Sincerely,

Charles B. Rosinski

EXHIBIT 9

City of Kirkland
Department of Planning and Community Development

APPLICATION FORM: ZONING PERMIT

PROCESS (Circle one) I IIA IIB III IV

Applicant's name: Charles Rosinski Daytime phone: 425-344-2763

Applicant's mailing address: P.O. Box 5000-139
Duvall, WA 98019

Note: If applicant is not property owner, he/she must be authorized as agent (see page 2).

Property Owner's name: Same Daytime phone:

Owner's address: _____

A COPY OF THE STAFF REPORT, MEETING AGENDAS AND THE NOTICE OF DECISION WILL BE MAILED TO THE APPLICANT. PLEASE INDICATE IF YOU WOULD ALSO LIKE A COPY OF THESE MATERIALS TO BE SENT TO THE PROPERTY OWNER: YES ___ NO ___

(1) Property address (if vacant, indicate lot or tax number, access street and nearest intersection): Lot 5
9.5XX Slater Ave. NE

(2) Tax parcel number: 123850-0185

(3) The property is zoned: Residential and is presently used as: Vacant Lot

(4) Describe permit application and the nature of project (attach additional pages if necessary):
Wetland Buffer Modification for one
New single-family residence.

(5) Have there been any previous zoning permits for the subject property? NO If so, what is the Department of Planning and Community Development file number? _____

(6) Have you met with a planner prior to submitting your application? YES NO ___
Name of planner: Tony Leavitt Date of pre-submittal meeting: 8/6/04

YOUR APPLICATION WILL NOT BE COMPLETE UNTIL ALL DOCUMENTS LISTED ON THE APPLICATION CHECKLIST ARE SUBMITTED.

YOU MAY NOT BEGIN ANY ACTIVITY BASED ON THIS APPLICATION UNTIL A DECISION, INCLUDING THE RESOLUTION OF ANY APPEAL, HAS BEEN MADE. CONDITIONS OR RESTRICTIONS MAY BE PLACED ON YOUR REQUEST IF IT IS APPROVED. AFTER THE CITY HAS ACTED ON YOUR APPLICATION, YOU WILL RECEIVE FORMAL NOTICE OF THE OUTCOME. IF AN APPEAL IS FILED, YOU MAY NOT BEGIN ANY WORK UNTIL THE APPEAL IS SETTLED. YOU MAY ALSO NEED APPROVALS FROM OTHER CITY DEPARTMENTS. PLEASE CHECK THIS BEFORE BEGINNING ANY ACTIVITY.

If you suspect that your site contains a stream or wetland or is adjacent to a lake, you may need a permit from the state or federal government.

City of Kirkland

Department of Planning and Community Development

APPLICATION FORM: ZONING PERMIT

STATEMENT OF OWNERSHIP/DESIGNATION OF AGENT

The undersigned property owners, under penalty of perjury, each state that we are all of the legal owners of the property described in Exhibit A, which is attached as page 3 of this application, and designate _____ to act as our agent with respect to this application.

AUTHORITY TO ENTER PROPERTY

(I/We) do ___ do not ___ hereby authorize employees of the City of Kirkland to enter onto the property which is the subject of this application for the sole purpose of making any examination of the property which is necessary to process this application.

HOLD HARMLESS AGREEMENT - READ CAREFULLY BEFORE SIGNING

The undersigned in making this application certifies under penalty of perjury, the truth and/or accuracy of all statements, designs, plans and/or specifications submitted with said application and hereby agrees to defend, pay, and save harmless the City of Kirkland, its officers, employees, and agents from any and all claims, including costs, expenses and attorney's fees incurred in investigation and defense of said claims whether real or imaginary which may be hereafter made by any person including the undersigned, his successors, assigns, employees, and agents, and arising out of reliance by the City of Kirkland, its officers, employees and agents upon any maps, designs, drawings, plans or specifications, or any factual statements, including the reasonable inferences to be drawn therefrom contained in said application or submitted along with said application.

Applicant		Property Owner #1	
Signature:	<u>Charles Rosinski</u>	Signature:	<u>Charles Rosinski</u>
Name:	<u>Charles Rosinski</u>	Name:	<u>Same</u>
Address:	<u>P.O. Box 5000-139</u> <u>Kirkland, WA 98019</u> <u>Duvall</u>	Address:	_____
Telephone:	<u>425-344-2763</u>	Telephone:	_____
Agent (Other than Applicant)		Property Owner # 2	
Signature:	_____	Signature:	_____
Name:	_____	Name:	_____
Address:	_____	Address:	_____
Telephone:	_____	Telephone:	_____

City of Kirkland
Department of Planning and Community Development

APPLICATION FORM: ZONING PERMIT

EXHIBIT A: LEGAL DESCRIPTION

LEGAL DESCRIPTION

LOT 5, BLOCK 43 OF BURKE AND FARRAR'S KIRKLAND ADDITION
TO THE CITY OF SEATTLE, AS PER PLAT RECORDED IN VOLUME 20
OF PLATS, PAGE 14, RECORDS OF KING COUNTY AUDITOR;

SITUATE IN THE CITY OF KIRKLAND, COUNTY OF KING,
STATE OF WASHINGTON.

JAN 14 2005



January 12, 2005

Duana Kolouskova
Johns Monroe Mitsunaga, PLLC
1500 114th Avenue SE
Suite 102
Bellevue, WA 98004

Subject: Rosinski Buffer Modification Application, ZON04-00019

Dear Ms. Kolouskova:

It is my understanding that you represent Mr. Charlie Rosinski in conjunction with his interest in the property located in the City of Kirkland. On August 20, 2004 your client submitted an application to modify the Type 1 Wetland Buffer on his property located at 95xx Slater Avenue NE. His application proposes to reduce the buffer from the required 100 feet to approximately 21 feet and modify the buffer through enhancement per Kirkland Zoning Code section 90.60.

The proposal was sent to the City's Wetland Consultants, The Watershed Company, in December of 2004 as part of the normal review process for buffer modification applications. A representative of The Watershed Company, Hugh Mortensen, recently informed me of his findings. He determined that Mr. Rosinski's proposal did not meet the criteria for a wetland buffer modification as set forth in KZC section 90.60.2a.2. This section provides that the wetland buffers may not be reduced at any point by more than one-third of the standards in KZC 90.45. Mr. Rosinski's proposal exceeds this buffer reduction maximum. The Planning Department also reviewed Mr. Rosinski's plans and has reconfirmed The Watershed Company's findings. I'm writing to advise you and Mr. Rosinski of our findings so that you and he can determine how you would like the City to handle his wetland buffer modification application at this time.

As a result of these findings, Mr. Rosinski has the following two options regarding his pending wetland buffer modification application:

- Withdraw the current application for a wetland buffer modification, or
- Continue the process through the public hearing before the Kirkland Hearing Examiner (the Hearing Examiner is the City's decision maker for this type of application). Based on the provisions of the Kirkland Zoning Code noted above, staff concludes that the application would likely be denied. The Hearing Examiner can choose to accept or reject the City recommended denial. As part of the process, a closed record appeal of the decision to the City Council is also available.

EXHIBIT

I

Please advise us in writing and advise me which of the two options above Mr. Rosinski would like to pursue. The City would prefer a response by January 24th, if possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Tony Leavitt". The signature is fluid and cursive, with a prominent loop at the end.

Tony Leavitt
Planner

CC: Charlie Rosinski, PO Box 5000-139, Duvali, WA 98019
Robin Jenkinson, City Attorney
Notebook
File No. ZON04-00019



JOHNS MONROE MITSUNAGA
PLLC

Robert D. Johns Michael P. Monroe Darrell S. Mitsunaga Duana T. Koloušková

Tony Leavitt, Planner
City of Kirkland
Department of Planning and Community
Development
123 5th Avenue
Kirkland, WA 98033

April 28, 2005

Re: Lot 5/Slater Avenue, Reasonable Use Application

Dear Tony:

As you are already aware, this office represents Charles Rosinski with respect to his property known as Lot 5 on Slater Avenue. This letter and the materials submitted herewith constitute Mr. Rosinski's application for reasonable use approval to construct one single family residence on Lot 5, accessed from Slater Avenue N.E.

As you are already aware, Mr. Rosinski submitted an application for wetland buffer modification in August, 2004, which included a detailed wetland report from Wetland Resources, Inc. Mr. Rosinski submitted that application for wetland buffer modification based on the City's prior written finding that "a Wetland Buffer Modification/Reduction is a viable option for Mr. Rosinski to allow for the construction of one new single-family residence." A copy of the City's original letter finding that the buffer modification was the appropriate review process is attached hereto.

After Mr. Rosinski submitted his original application, the City determined that Mr. Rosinski should instead apply for a reasonable use approval and that staff would not support a buffer modification. As a result, Mr. Rosinski hereby submits this application for reasonable use.

As you are aware, Mr. Rosinski has already paid \$7953.50 in application fees based on the City's prior determination that Mr. Rosinski had to submit an application for buffer modification. In addition, Mr. Rosinski has lost approximately eight months of time due to the City's change of heart. Mr. Rosinski would not have submitted the buffer modification application but for the City's written determination that such was the appropriate review process. As a result, we request the City to (a) expedite this second

T: (425) 451-2812 • F: (425) 451-2818

Cypress Building
1500 114th Ave. SE • Suite 102 • Bellevue, WA 98004

EXHIBIT J

application for reasonable use and (b) apply all fees previously paid toward the review of this reasonable use application.

Turning to the reasonable use application, following is a discussion of how Mr. Rosinski's proposal meets the reasonable use standards listed in Kirkland Municipal Code §90.140. The code provisions are set forth in bold, and answers follow in sequence.

There is no permitted type of land use for the property with less impact on the sensitive area and the buffer is feasible and reasonable.

The legally platted lot is encumbered by a Type 1 wetland and its associated buffer. Mr. Rosinski desires to construct a modest single family home on a this previously platted single family residential lot. Mr. Rosinski does not propose to construct any structures in the wetland itself. The single family residence will be confined to the buffer and placed on the corner of the lot at the furthest point possible from the wetland. Mr. Rosinski has designed a house well below the size and dimensional allowance that might otherwise be permitted for the property but for the sensitive area restrictions.

No on-site alternative to the proposal is feasible and reasonable, considering possible changes in site layout, reductions in density and similar factors.

Correct, see above discussion. The single family residence is proposed for the only feasible location on the lot at the furthest distance possible from the sensitive area.

The proposal, as conditioned, will result in a minimum feasible alteration or impairment to the functional characteristics of the sensitive areas, and their existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and will not cause significant degradation of groundwater or surface-water quality.

Mr. Rosinski has provided a sensitive areas study by Wetland Resources, Inc., which recommends enhancement of the on-site buffer with native vegetation. Currently, significant portions of the buffer are covered by non-native vegetation. Mr. Rosinski proposes to reduce the typical 100 foot buffer to allow for construction of the single family home, and in exchange, to enhance the remaining portions of the on-site wetland buffer with native vegetation. Wetland Resources concludes that such actions "would increase the functions and values of the existing wetland buffer on-site." The on-site buffer enhancements will improve hydrologic control, water quality, and wildlife habitat for the buffer and, consequently, the wetland itself.

Tony Leavitt
April 28, 2005
Page 3

The inability to derive a reasonable use is not the result of the applicant's actions.

Mr. Rosinski purchased Lot 5 after it was platted. Mr. Rosinski has not adjusted the boundary lines or in any other manner affected the dimensions of the lot. Mr. Rosinski has not taken any actions that would operate to create the need for reasonable use. Simply, the lot as approved by the governing authority is the same and necessitates a reasonable use approval.

The land use and environmental regulations which prevent reasonable use of the property were in effect at the time the applicant purchased the property.

To the best of Mr. Rosinski's knowledge the land use and environmental regulations which prevent reasonable use of the property were in effect at the time the applicant purchased the property. Mr. Rosinski purchased the property with the intention of constructing a single family residence once sewer was extended to the lot, which took a few years. Mr. Rosinski's proposed use is consistent with the intended use for Lot 5 when the property was subdivided.

Thank you for your review of this application. Again, we request that all fees previously paid by Mr. Rosinski be applied to this reasonable use application and that the review process be expedited.

Sincerely,



Duana T. Koloušková

Direct Tel: (425) 467-9966

Email: kolouskova@jmmlaw.com

Enclosures

cc: Client

1820-1 application letter to City 4-26-05

JOHNS MONROE MITSUNAGA
PLLC

City of Kirkland
Department of Planning and Community Development

APPLICATION FORM: ZONING PERMIT

PROCESS (Circle one) I IIA **IIIB** III IV

Applicant's name: CHARLES ROSINSKI Daytime phone: (425) 344-2763

Applicant's mailing address: P.O. BOX 5000-139
DUWALL, WA. 98019

Note: If applicant is not property owner, he/she must be authorized as agent (see page 2) (see actn'd agent wife)

Property Owner's name: SAME Daytime phone: _____

Owner's address: _____

A COPY OF THE STAFF REPORT, MEETING AGENDAS AND THE NOTICE OF DECISION WILL BE MAILED TO THE APPLICANT. PLEASE INDICATE IF YOU WOULD ALSO LIKE A COPY OF THESE MATERIALS TO BE SENT TO THE PROPERTY OWNER: YES NO

(1) Property address (if vacant, indicate lot or tax number, access street and nearest intersection): LOT 5;
~~95XX~~ 95XX SLATER AVE NE

(2) Tax parcel number: 123850-0685

(3) The property is zoned: RESIDENTIAL and is presently used as: VACANT

(4) Describe permit application and the nature of project (attach additional pages if necessary):
REASONABLE USE for S.F.R. - see attached

(5) Have there been any previous zoning permits for the subject property? No If so, what is the Department of Planning and Community Development file number? _____

(6) Have you met with a planner prior to submitting your application? YES NO
Name of planner: TONY LEVITT Date of pre-submittal meeting: 8/6/04 \$ subsequent discussion

YOUR APPLICATION WILL NOT BE COMPLETE UNTIL ALL DOCUMENTS LISTED ON THE APPLICATION CHECKLIST ARE SUBMITTED.

YOU MAY NOT BEGIN ANY ACTIVITY BASED ON THIS APPLICATION UNTIL A DECISION, INCLUDING THE RESOLUTION OF ANY APPEAL, HAS BEEN MADE. CONDITIONS OR RESTRICTIONS MAY BE PLACED ON YOUR REQUEST IF IT IS APPROVED. AFTER THE CITY HAS ACTED ON YOUR APPLICATION, YOU WILL RECEIVE FORMAL NOTICE OF THE OUTCOME. IF AN APPEAL IS FILED, YOU MAY NOT BEGIN ANY WORK UNTIL THE APPEAL IS SETTLED. YOU MAY ALSO NEED APPROVALS FROM OTHER CITY DEPARTMENTS. PLEASE CHECK THIS BEFORE BEGINNING ANY ACTIVITY.

If you suspect that your site contains a stream or wetland or is adjacent to a lake, you may need a permit from the state or federal government.

City of Kirkland
Department of Planning and Community Development

APPLICATION FORM: ZONING PERMIT

STATEMENT OF OWNERSHIP/DESIGNATION OF AGENT

The undersigned property owners, under penalty of perjury, each state that we are all of the legal owners of the property described in Exhibit A, which is attached as page 3 of this application, and designate DUANA KOLOUŠKOVÁ to act as our agent with respect to this application.

AUTHORITY TO ENTER PROPERTY

(I/We) do X do not ___ hereby authorize employees of the City of Kirkland to enter onto the property which is the subject of this application for the sole purpose of making any examination of the property which is necessary to process this application.

HOLD HARMLESS AGREEMENT - READ CAREFULLY BEFORE SIGNING

The undersigned in making this application certifies under penalty of perjury, the truth and/or accuracy of all statements, designs, plans and/or specifications submitted with said application and hereby agrees to defend, pay, and save harmless the City of Kirkland, its officers, employees, and agents from any and all claims, including costs, expenses and attorney's fees incurred in investigation and defense of said claims whether real or imaginary which may be hereafter made by any person including the undersigned, his successors, assigns, employees, and agents, and arising out of reliance by the City of Kirkland, its officers, employees and agents upon any maps, designs, drawings, plans or specifications, or any factual statements, including the reasonable inferences to be drawn therefrom contained in said application or submitted along with said application.

Applicant		Property Owner #1	
Signature:	_____	Signature:	_____
Name:	<u>CHARLES POSINSKI</u>	Name:	<u>SAME</u>
Address:	<u>P.O. BOX 5700-159</u> <u>DURAY WA. 98019</u>	Address:	_____
Telephone:	_____	Telephone:	_____
Agent (Other than Applicant)		Property Owner # 2	
Signature:	<u>[Signature]</u>	Signature:	_____
Name:	<u>DUANA KOLOUŠKOVÁ</u>	Name:	_____
Address:	<u>1500 114th AVE SE #102</u> <u>BELLEVUE, WA. 98004</u>	Address:	_____
Telephone:	<u>(425) 467-9906</u>	Telephone:	_____

City of Kirkland
Department of Planning and Community Development

APPLICATION FORM: ZONING PERMIT

EXHIBIT A: LEGAL DESCRIPTION

LEGAL DESCRIPTION

LOT 5, BLOCK 43 OF BURKE AND FARRAR'S KIRKLAND ADDITION
TO THE CITY OF SEATTLE, AS PER PLAT RECORDED IN VOLUME 20
OF PLATS, PAGE 14, RECORDS OF KING COUNTY AUDITOR;

SITUATE IN THE CITY OF KIRKLAND, COUNTY OF KING,
STATE OF WASHINGTON.



JOHNS MONROE MITSUNAGA
PLLC

Robert D. Johns Michael P. Monroe Darrell S. Mitsunaga Duana T. Koloušková

City of Kirkland Hearing Examiner
123 Fifth Avenue
Kirkland, WA 98033

September 1, 2005

Re: Rosinski Reasonable Use Permit (ZON05-00016)
Hearing Date and Place: September 1, 2005; 7:00 p.m.
City of Kirkland – City Hall Council Chamber
123 Fifth Avenue, Kirkland, WA

Dear Hearing Examiner:

This office represents Charles Rosinski with respect to the above-referenced permit application for reasonable use. This letter shall be submitted at hearing of this matter to respond to the recommendation of the City of Kirkland, Planning and Community Development Department (“Planning Department”) to reject Mr. Rosinski’s application based on the singular ground that the assumed timing of Mr. Rosinski’s purchase of the property somehow precludes approval.

We strenuously dispute the Planning Department’s strained interpretation of the Kirkland Zoning Code (“KZC”) 90.140 and respectfully request that you recommend approval of reasonable use.

A Reasonable Use Permit Should Issue

KZC 90.140 states, in part:

In determining whether application of this chapter will deny reasonable use of the property, the decision maker shall consider the following:

1. The inability to derive reasonable use is the result of the applicant’s actions, such as segregating or dividing property and creating the undevelopable condition, or taking actions in violation of any local, state, or federal law or regulation; **and**

2. The land use and environmental regulations which prevent reasonable use of the property were in effect at the time of purchase of the property by the applicant.

(Emphasis added.) The Planning Department relies solely on paragraph 2 above as justification for rejection of reasonable use.

A. Purchase of the Property Pre-Dated the Applicable Environmental Regulations

As reflected in Mr. Rosinski's letter dated September 1, 2005, which shall be submitted at the hearing, the purchase agreement for acquisition the property actually occurred in 2000. The Advisory Report, Findings, Conclusions, and Recommendations ("Advisory Report") dated August 25, 2005, issued by the Planning Department, however, makes clear that "[t]he current Sensitive Area Regulations (Zoning Code Chapter 90) were adopted in April of 2002." (See, Advisory Report, pp. 5-6, ¶2(a)(4).)

The pertinent land use and environmental regulations which prevent reasonable use of the property were therefore **not** in effect at the time of purchase of the property by the applicant. The Planning Department's recommendation of rejection on this basis is therefore completely flawed and should be disregarded.

B. The Planning Department Isolation of a Single Factor to Reject Approval is Unsupportable.

The pertinent provisions set forth above are linked with an "and." "Statutory phrases separated by the word "and" generally should be construed in the conjunctive. See 1A Norman J. Singer, *Statutes and Statutory Construction* § 21:14, at 179-81 (6th ed.2002)." *HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services*, 148 Wash.2d 451, 474, f.n. 94, 61 P.3d 1141, 1152 (2003).

Consequently, the above phrases cannot be considered in isolation. Rather, in determining whether application of 90.140 would deny reasonable use, the existence of both (1) the "inability to derive reasonable use is the result of the applicant's actions, such as segregating or dividing property and creating the undevelopable condition, or taking actions in violation of any local, state, or federal law or regulations "land use and environmental regulations which prevent reasonable use of the property were in effect at the time of purchase of the property by the applicant" **and** (2) the "land use and environmental regulations which prevent reasonable use of the property were in effect at

the time of purchase of the property by the applicant” **must exist** for the Hearing Examiner to consider this as a basis for recommendation of denial.

Here, there is absolutely no dispute that Mr. Rosinski acquired Lot 5 after it was platted, that he has not adjusted the boundary lines or in any other manner affected the dimensions of the lot, or taken any actions that would operate to create the need for reasonable use. Since there is no basis that Mr. Mr. Rosinski somehow met the requirements of item (1), it is completely improper for the Planning Department to rely solely on item (2) even if the applicable land use and environmental regulations were in effect at the time of purchase.

Moreover, KZC 90.140 does not mandate that reasonable use be denied even if both of these factors are present. Rather, these are simply factors that should be considered and their existence does not require the Hearing Examiner to automatically recommend denial without consideration of the other criteria of KZC 90.140. Since the overwhelming factual evidence supports reasonable use, the Hearing Examiner is free to and should recommend approval.

B. The Planning Department Strained Interpretation Amounts to an Unconstitutional Taking of Property.

The Planning Department’s position precludes any and all use of the property, renders it completely valueless, and essentially forces Mr. Rosinski to forfeit land for the benefit of the City of Kirkland without compensation, and to provide an additional and unnecessary buffer to the wetland. This amounts to both an unconstitutional taking and violation of substantive due process.

Where a land use decision is challenged under both takings and substantive due process, we must first examine the takings issue. *Guimont v. Clarke*, 121 Wash.2d 586, 594, 854 P.2d 1 (1993). A takings claim must pass two threshold questions. The first question is whether the decision denies the owner a fundamental attribute of property ownership which includes the right to possess the property, to exclude others from the property, to dispose of the property, or to make some economically viable use of the property. *Id.* at 601-02, 854 P.2d 1; 121 Wash.2d 625, 643-44, 854 P.2d 23 (1993); *Presbytery of Seattle v. King County*, 114 Wash.2d 320, 329-30, 787 P.2d 907 (1990). A property owner alleging an unconstitutional taking bears the burden of establishing the challenged regulation destroys one of these fundamental attributes of ownership. *Guimont*, 121 Wash.2d at 604-05, 854 P.2d 1; *Ventures Northwest Ltd.*

Partnership v. State, 81 Wash.App. 353, 363, 914 P.2d 1180 (1996). The landowner must have the opportunity to prove at the outset that the regulation either physically "invades" his or her property, or constitutes a "total taking" by denying all economically beneficial or productive use of the property. *Guimont*, 121 Wash.2d at 602, 854 P.2d 1; *Margola*, 121 Wash.2d at 644, 854 P.2d 23.

If the landowner does not meet any part of the first threshold question, then we address whether the ordinance merely protects the public interest in "health, safety, the environment or the fiscal integrity of an area," or whether it goes further by requiring that the regulated party confer a public benefit. *Guimont*, 121 Wash.2d at 603, 854 P.2d 1 (citing *Robinson v. Seattle*, 119 Wash.2d 34, 49, 830 P.2d 318 (1992)); see *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 14-15, 829 P.2d 765 (1992). If the claimant fails to meet the second threshold question as well, then we proceed to the substantive due process claim. *Guimont*, 121 Wash.2d at 594, 854 P.2d 1.

Even if a land use decision is not deemed to be a regulatory taking, it must still pass the constitutional due process test of reasonableness. *Presbytery*, 114 Wash.2d at 330, 787 P.2d 907. The *Presbytery* court established a three-prong test for making this determination: (1) Is the decision aimed at achieving a legitimate public purpose; (2) does it use means that are reasonably necessary to achieve that purpose; and (3) is it unduly oppressive to the landowner? *Id.*

Kahuna Land Co. v. Spokane County, 94 Wash.App. 836, 841-842, 974 P.2d 1249, 1252 – 1253 (1999).

Here, there is no dispute that failure to grant reasonable use will destroy all economic and productive viability of the property, forces Mr. Rosinski to convey a public benefit without merely protecting the health, safety, the environment or the fiscal integrity of an area, and is unreasonable and unduly oppressive to Mr. Rosinski. The section of KZC 90.140 relied upon by the Planning Department for rejection of reasonable use is therefore constitutionally flawed.

City of Kirkland Hearing Examiner
September 1, 2005

Conclusion

We therefore respectfully request that the Hearing Examiner recommend approval of Reasonable Use Permit (ZON05-00016).

Very truly yours,



Darrell S. Mitsunaga

cc: Charles Rosinski

Direct Tel: (425) 467-9962

Email: mitsunaga@jmmlaw.com

1820-1 Mitsunaga Ltr to Kirkland Hearing Examiner 09-01-05



CITY OF KIRKLAND

Planning and Community Development Department
123 Fifth Avenue, Kirkland, WA 98033 425.587-3225
www.ci.kirkland.wa.us

MEMORANDUM

To: Ron McConnell, Kirkland Hearing Examiner

From: Tony Leavitt, Planner *TL*
Jeremy McMahan, Planning Supervisor
Robin Jenkinson, City Attorney

Date: September 15, 2005

Subject: Rosinski Reasonable Use Application Staff Response, File No. ZON05-00016

At the Hearing on September 1st, Staff requested that the Hearing Examiner continue the hearing to allow staff enough time to review the two letters submitted at the hearing, Mr. Rosinski's letter (entered as Exhibit C) and Mr. Mitsunaga's letter (entered at Exhibit D), and draft a response. The Hearing Examiner agreed to give Staff until September 15th to respond to the letters and also gave the applicant until September 29th to draft a rebuttal to Staff's response. This memo is a response to both of these letters.

Factual Chronology

As it relates to the interaction with the City of Kirkland, Staff generally agrees with the timeline provided in Mr. Rosinski's letter, except that Staff would like clarify some of these items:

December, 2002: Staff first met with Mr. Rosinski after an Order to Cease Activities was issued for work being done on the subject property without the proper approval. At this time, Staff advised Mr. Rosinski that a wetland delineation for the property would need to be completed to determine the exact extent of the wetland on the property. Staff also gave Mr. Rosinski a copy of Kirkland Zoning Code (KZC) Chapter 90 and went over applicable code sections. Staff did not recommend a Buffer Modification at this time, as we were not aware of the location of the wetland's edge.

August 20, 2003: The report prepared by Wetland Resources, Inc. incorrectly combined the Buffer Modification Criteria with the Reasonable Use Criteria (see Enclosure 1). This error was not discovered by Staff until the Buffer Modification Review by The Watershed Company (the City's Wetland Consultant) on December 15, 2004. The report also included the wetland delineation as required by the Kirkland Zoning Code.

December 8, 2003: In Staff's letter to Capital Resource Group, Staff states that the "based on work by Wetland Resources, a Wetland Buffer Modification/ Reduction is a viable option for Mr.

EXHIBIT <u>E</u>
<u>HE REC. ZON05-00016</u>

Rosinski.” As noted above, this statement was based on an erroneous analysis by Wetland Resources in their August 20th report and Staff and the City consultants did not discover this until December 15, 2004.

December 11, 2003: Mr. Rosinski submitted the August 20, 2003, report for review by Adolfson Associates. Adolfson was only under contract to review the wetland delineation portion of the report (see Enclosure 2) and not the buffer modification portion. This review is required by KZC 90.40 and was paid for by Mr. Rosinski. Enclosure 3 contains the Adolfson review letter dated January 21, 2004.

December 2, 2004: Mr. Rosinski paid for the first review of the buffer modification portion of the report, not another review of his report.

December 15, 2004: Staff received a call from a representative of The Watershed Company stating that the proposed project did not meet the requirements for a buffer modification. The buffer modification only allows for a buffer reduction of up to 1/3 of the wetland buffer. For a Type I Wetland the buffer can only be reduced from 100 feet to 67 feet. Mr. Rosinski’s proposal was for a reduction of nearly 80 feet (from 100 feet to 20 feet). This was the first time that Staff realized that the proposal did not meet this specific requirement. As Mr. Rosinski noted, this issue was immediately brought to his attention.

January 12, 2005: The first time that Staff became aware of an issue with the buffer modification was on December 15 of 2004.

April 28, 2005: Mr. Rosinski’s attorney addresses the ownership issue in her letter (see Attachment 6 of the Staff Advisory Report), but she misinterpreted this section of code. Addressing this code section was a requirement for the application packet.

Property Ownership

The first issue to consider is what rules were in place when the property was purchased by the applicant? The Real Estate Excise Tax Affidavit indicates that Mr. Rosinski assumed ownership of the property on July 8, 2004. Mr. Rosinski argues that he took ownership of the property on July 9th, 2000. If this is the actual date that Mr. Rosinski took ownership of the property, then the interim regulations for sensitive areas as adopted by Ordinance Numbers 3658, 3706, and 3742 were in place when he purchased the property (see Enclosure 4). These regulations are essentially the same as the current regulation in terms of required buffers, wetland types, buffer modification requirements, etc. As a result, even if it is one were to conclude that Mr. Rosinski purchased the property in July of 2000, the land use and environmental regulations which prevent reasonable use of the property were in effect at the time of purchase of the property by the applicant.

The second issue to consider is what information was available to the buyer and seller. Following the Hearing date, Staff was able to locate a survey prepared for the previous property owner, Mr. Keith Gosney, in October of 1997 (see Enclosure 5). This survey shows five lots (including the

subject property) and the extent of the wetlands on these properties. Staff does not know if this information was passed onto Mr. Rosinski at the time that he took ownership of the property to make him aware of the environmental constraints on the property.

Finally, on the Real Estate Excise Tax Affidavit, Mr. Rosinski signed a statement declaring that at the time of purchase and sale agreement the property was unbuildable. At the September 1st Hearing, Mr. Rosinski stated that the reason for the signed Real Estate Excise Tax Affidavit Statement that the property was unbuildable was due to the fact that the property did not have a sewer connection within a reasonable distance. In fact, a sewer line was installed and completed within the Slater Avenue right-of-way in late 2003. A letter sent to Mr. and Mrs. Gosney, property owners of record with the King County Assessor's Office, in January of 2004 (see Enclosure 6) states that a sewer line was extended in front of the subject property and that the property is subject to a Latecomer's Assessment. Furthermore, Mr. Rosinski must have known of the sewer line at the time he signed the tax affidavit, due to the fact that the sewer line is depicted on the site plan (see Attachment 2 of the Staff Advisory Report) that was prepared in December of 2003.

What the Hearing Examiner is Being Asked to Consider

Turning to the arguments of Mr. Rosinski's attorney, Staff acknowledges that the following language in KZC 90.140 with respect to what the decision-maker is to **consider** in determining whether application of KZC Ch. 90 will deny reasonable use is conjunctive:

In determining whether the application of this chapter will deny reasonable use of the property, the decision maker shall **consider** the following:

1. The inability to derive reasonable use is the result of the applicant's actions, such as segregating or dividing the property and creating the undevelopable condition, or taking actions in violation of any local, state, or federal law or regulation; and
2. The land use and environmental regulations which prevent reasonable use of the property were in effect at the time of purchase of the property by the applicant. (Emphasis supplied.)

However, as Mr. Rosinski's attorney points out, "these are simply factors that should be **considered** . . ." KZC 90.140 does not require that both 1 and 2 be met nor state that the decision-maker may not take other factors into consideration. Staff focused on the timing of Mr. Rosinski's purchase and the regulations in place at the time of purchase. As discussed above, this view is not altered even if the Hearing Examiner accepts that Mr. Rosinski took ownership of the property in 2000. Moreover, Staff considered, and is asking the Hearing Examiner to consider, Mr. Rosinski's constructive and actual knowledge at the time of purchase.

Regulatory Takings Argument

Mr. Rosinski's attorney next contends that the Planning Department's position constitutes an unconstitutional taking. We disagree. Mr. Rosinski's attorney challenges the section of KZC 90.140 relied upon by the Planning Department for rejection of reasonable use, on its face and as applied (although not in that order). "In a facial challenge, the property owner must show the challenged regulation denied all economically viable use of his or her property." Orion Corp. v. State, 109 Wn.2d 621, 656, 747 P.2d 1062 (1987), cert. denied 486 U.S.1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988). Mr. Rosinski has not demonstrated that he will be denied all economically viable use of his property. Thus, Mr. Rosinski's facial challenge is without merit. Mr. Rosinski's attorney contends the Planning Department's position, or KZC 90.140 as applied to the applicant's property, is unconstitutional. The evidence in the record does not establish that KZC 90.140 caused the applicant a "significant economic deprivation" Orion at 633. There is no evidence that the applicant's "fundamental attributes of ownership" have been extinguished.

You cannot lose what you never had. The 1997 survey prepared for Mr. Gosney demonstrated the extent of the wetland. The wetland regulations in place when Mr. Rosinski asserts he purchased the property in 2000 would have prevented the use Mr. Rosinski seeks to make of the property today. Mr. Rosinski certified, under penalty of perjury, that at the time he entered the purchase and sale agreement with Gosneys in 2004, "the property was unbuildable." Mr. Rosinski purchased property in **Forbes Lake**. Courts which have looked at the effect of a property owner's prior knowledge on a takings claim have concluded that there is no property right or property interest or right to build where an owner purchases the property knowing of environmental or land use regulations that limit or prohibit development.

In Alegria v. Keeney, 687 A.2d 1249, 1253 (R.I 1997), the Court stated as follows:

We agree with plaintiff that prior knowledge of applicable regulations is relevant in determining whether a claimant's investment-backed expectations were reasonable under the Penn Central analysis. In this case, plaintiff purchased the property knowing that its wetlands were subject to regulations. Therefore, we are led to conclude that plaintiff accepted the risk that the development plans he preferred would be disapproved. Although his investment-backed expectation to eventually develop the property in some manner may have been reasonable, plaintiff has not yet been prohibited from pursuing alternative proposals. Any investment-backed expectation to develop the property as though wetlands were not present, however, was unreasonable in light of this state's pervasive wetlands regulations.

Similarly, in Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994), the Court concluded:

The third criterion – the extent to which the regulation interferes with the property owner's expectations – limits the recovery to owners who can demonstrate that they bought their property in reliance on the nonexistence of the challenged

regulation. One who buys with knowledge of a restraint assumes the risk of economic loss. [Citations omitted.] In such case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall.

In Gazza v. New York State Dep't of Env'tl. Conservation, 89 N.Y 2d 603, 616 (N.Y. 1997) the Court acknowledged:

Our courts have long recognized that a property interest must exist before it may be 'taken' (United States v. Willow Riv. Co., 324 US 499, 502-503; Bennet v. Long Is. R. R. Co., 181 NY 431, 435). Neither may a taking claim be based upon property rights that have already been taken away from a landowner in favor of the public. . . . To paraphrase Supreme Court's ruling, the purchase of a 'bundle of rights' necessarily includes the acquisition of a bundle of limitations.

A final example of how courts have looked at a property owner's prior knowledge, but by no means the last example, is found in Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999) as follows:

At the time he bought the subject parcel, Appellant acknowledged both the necessity and difficulty of obtaining regulatory approval. The sales contract specifically stated that 'the Buyers recognize that . . . as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations.' Appellant thus had both constructive and actual knowledge that either state or federal regulations could ultimately prevent him from building on the property. Despite his knowledge of the difficulty of the regulatory path ahead, Appellant took no steps to obtain the required regulatory approval for seven years.

The evidence has established that Mr. Rosinski was aware of potential wetland problems with the property. Staff asserts that this knowledge is relevant to his takings claim.

In conclusion, Staff continues to recommend denial of the proposal based on the fact that the land use and environmental regulations which prevent reasonable use of the property were in effect at the time of purchase of the property by the applicant. Further, the 1997 survey indicates that the previous property owner was well aware of the environmental constraints on the property.

Enclosures

1. Wetland Resources Inc. Report dated August 20, 2003
2. Wetland Delineation Review Contract
3. Wetland Delineation Review Letter
4. Ordinance Numbers 3658, 3706, and 3742
5. Survey prepared by Harstad Consultants in October of 1997
6. Slater Avenue NE Sanitary Sewer Latecomer's Assessment Letter



Wetland Resources, Inc.

Delineation / Mitigation / Restoration / Habitat Creation / Permit Assistance

9505 19th Avenue S.E.
Suite 106
Everett, Washington 98208
(425) 337-3174
Fax (425) 337-3045

SENSITIVE AREA STUDY AND BUFFER MODIFICATION PLAN

FOR

ROSINSKI - LOT 5/SLATER AVENUE

Wetland Resources, Inc. Project #03198

Prepared By:

Wetland Resources, Inc.
9505 19th Ave. SE, Suite 106
Everett, WA 98208
(425) 337-3174

For:

Charles Rosinski
19916 Old Owen Rd.; Suite 211
Monroe, WA 98272

August 20, 2003

RECEIVED
AUG 26 2003

ENCLOSURE <u>1</u>
STAFF MEMO - 9/15/05

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SITE DESCRIPTION

Wetland Resources, Inc. conducted a wetland delineation on the subject property in July of 2003. The subject site encompasses approximately 0.7 acres, lying southeast of the intersection of Slater Avenue NE and NE 97th Street in the city of Kirkland, Washington (Section 4, Township 25N, Range 5E, W.M.).

Residential lots surround the subject property to the south and north, and Slater Avenue NE borders the property on the west. A portion of Forbes Lake covers the eastern half of the property. The western portion of the site slopes from Slater Avenue NE east towards Forbes Lake. No buildings exist on the subject site.

The City of Kirkland classifies its wetlands according to the Kirkland Zoning Code (KZC), Chapter 90. Forbes Lake covers the eastern half of the property, and the wetland boundary extends west of the lake towards Slater Avenue NE. Therefore, one contiguous wetland covers the eastern 3/4 of the subject site. Forbes Lake and the associated wetland continue north and south of the subject site. No streams exist on-site. Under KZC, Section 90.30, the on-site wetland is categorized as a Type 1 wetland. Under KZC, Section 90.45, Type 1 wetlands are typically designated 100-foot buffers. To accommodate a single-family residence in the western 1/4 of the property, the applicant is proposing to modify the typical buffers pursuant to KZC Section 90.60.2 and 90.140.

The vegetation within the on-site wetland (west of the open water portion of the wetland) contains a few trees and a dense shrub layer. Black cottonwood trees are present in the wetland, while willows and hardhack dominate the dense shrub layer. The understory in the wetland portions on-site is very open, because the thick shrub layer does not allow the needed sunlight to penetrate through. West of the wetland edge, native vegetation exists for approximately 20 feet toward Slater Avenue NE. The area to the west of the native vegetation has been recently cleared and is currently dominated by Himalayan blackberry and reed canarygrass, both of which are non-native species. No canopy or shrub layer exists in the western portion of the property where the clearing occurred.

WETLAND CLASSIFICATION - COWARDIN SYSTEM

According to the Cowardin System, developed by the U.S. Fish and Wildlife Service and described in Classification of Wetlands and Deepwater Habitats of the United States, the classification for the on-site wetland is as follows:

On-site Wetland: Palustrine, Aquatic Bed, Rooted Vascular

WETLAND CLASSIFICATIONS - CITY OF KIRKLAND

Under the City of Kirkland Sensitive Areas Ordinance, Section 90.30, the on-site wetland is classified as follows:

On-site Wetland: Type 1 Wetland. The Forbes Lake wetland, which covers the entire eastern 3/4 of the subject site, is a Type 1 wetland. It is equal to or greater than 10 acres in size and has three or more wetland classes, one of which is open water (KZC 90.30.17c). Type 1 wetlands generally receive 100-foot buffers in the city of Kirkland.

WETLAND DETERMINATION REPORT

Methodology:

On-site, the routine methodology described in the Washington State Wetlands Identification and Delineation Manual (Washington State Department of Ecology Publication #96-94, March 1997) was used to make a determination, as required by the City of Kirkland. Under this method, the process for making a wetland determination is based on three sequential steps:

- 1.) Examination of the site for hydrophytic vegetation (species present and percent cover);
- 2.) If hydrophytic vegetation is found, then the presence of hydric soils is determined.
- 3.) The final step is determining if wetland hydrology exists in the area examined under the first two steps.

The following criteria descriptions were used in the boundary determination:

Wetland Vegetation Criteria:

The 1997 edition of the Washington State Wetlands Identification and Delineation Manual defines hydrophytic vegetation as "the sum total of macrophytic plant life that occurs in areas where the frequency and duration of inundation or soil saturation produce permanently or periodically saturated soils of sufficient duration to exert a controlling influence on the plant species present." Field indicators were used to determine whether the vegetation meets the definition for hydrophytic vegetation.

Wetland Soils Criteria and Mapped Description:

The 1997 edition of the Washington State Wetlands Identification and Delineation Manual defines hydric soils as "soils that formed under conditions of saturation,

flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part.” Field indicators were used to determine whether a given soil meets the definition for hydric soils.

The Soil Conservation Service mapped the subject property as Alderwood gravelly sandy loam soils with 6 to 15 percent slopes. The Alderwood soils are considered to be moderately deep over a hardpan and moderately well drained soils that formed under conifers in glacial till. Permeability of this Alderwood soil is moderately rapid in the surface layer and subsoil and very slow in the substratum. Available water capacity is low, runoff is slow to medium, and the hazard of erosion is moderate. This soil is used for urban development, timber, pasture, berries, and row crops.

Wetland Hydrology Criteria:

The 1997 edition of the Washington State Wetlands Identification and Delineation Manual states that the “term wetland hydrology encompasses all hydrologic characteristics of areas that are periodically inundated or have soils saturated to the surface for a sufficient duration during the growing season.” It also explains that “areas with evident characteristics of wetland hydrology are those where the presence of water has an overriding influence on characteristics of vegetation and soils due to anaerobic and chemically reducing conditions, respectively.”

Additionally, the manual states that “areas which are seasonally inundated and/or saturated to the surface for a consecutive number of days \geq 12.5 percent of the growing season are wetlands, provided the soil and vegetation parameters are met. Areas inundated or saturated between 5 and 12.5 percent of the growing season in most years may or may not be wetlands. Areas saturated to the surface for less than 5 percent of the growing season are non-wetlands.” Field indicators were used to determine whether wetland hydrology parameters were met on this site.

BOUNDARY DETERMINATION FINDINGS

On-site Wetland Areas:

The on-site wetland is a Type 1 wetland. The open water of Forbes Lake occupies most of the on-site wetland. The wetland area to the west of the open water contains a few black cottonwood (*Populus balsamifera*-Fac) trees. However, shrubs such as willows (*Salix spp.*-Fac-FacW) and hardhack (*Spiraea douglasii*-FacW) dominate the wetland vegetation, with very few herbaceous plants existing in the understory. The dominance of these “Facultative Wet” plant species indicate that the wetland area supports hydrophytic vegetation.

The soils in the wetland area west of the open water on-site generally display Munsell colors of black (10YR 2/1) from the surface to greater than 18” below the surface. The soils have an organic/silt texture, and were slightly moist from 0-18” throughout the wetland area at the time of investigation.

The presence of wetland plant species indicates that the observed hydrology persists into the growing season. The soil colors described above also indicate persistent wetland hydrology. Therefore, it appears that the on-site wetland meets the hydrological parameters outlined in the delineation manual.

Non-wetland Area:

The vegetation in the non-wetland area on-site varies. The buffer areas within 20 feet west of the wetland edge contain native trees and shrubs such as black cottonwood, red alder (*Alnus rubra*-Fac), and willows. The non-wetland area west of those native trees and shrubs has been recently cleared and contains only herbaceous species such as reed canarygrass (*Phalaris arundinacea*-FacW), Himalayan blackberry (*Rubus discolor*-FacU), and horsetail (*Equisetum spp.*-Fac). Himalayan blackberry and reed canarygrass are non-native species that easily adapt to disturbance and are opportunistic plant species.

The soils in the non-wetland portion of the site differ from the soils in the wetland portion of the site. From the surface to 18" below the surface, the soils in the non-wetland portion of the site generally display a Munsell color of olive brown (2.5Y 4/3). During the site investigation, the non-wetland soils were dry with a texture of sandy loam.

PROJECT DESCRIPTION AND REASONABLE USE PROPOSAL

The applicant is proposing a single-family residence in the SW portion of the subject site. The single-family residence would be constructed 20 feet east of Slater Avenue and 10 feet north of the southern property boundary to observe the required building setbacks. Pursuant to the Reasonable Use portion of the KZC, Section 90.140, the applicant is proposing to modify the wetland buffer to accommodate the single-family residence. This proposed buffer modification would affect the buffer applied to the Type 1 wetland on-site. To accommodate the house and associated infrastructure, the applicant is proposing buffer reduction with enhancement (KZC 90.60.2.a.2). Therefore, the applicant is proposing to reduce the typical Type 1 wetland buffer from its typical 100 feet in exchange for enhancement of the remaining portions of the wetland buffer with native vegetation. This Reasonable Use application would increase the functions and values of the existing wetland buffer on-site.

PROPOSED BUFFER MODIFICATION PLAN

To mitigate for the reduced wetland buffer, the applicant is proposing to remove all non-native vegetation that occupies the buffer and enhance the remaining buffer area with native vegetation. The proposed buffer enhancement area equals 5,710 square feet in area. Shrubs will be planted across the entire 5,710 square feet of the enhancement area. The applicant is also proposing to plant native trees north of the proposed house to the northern property boundary. The area

proposed for planting native trees equals 3,006 square feet (see map). This area has been cleared and the shrubs and trees will increase the functions and values of the buffer. The proposed distribution of native plants for this buffer enhancement follows:

<i>Proposed Buffer Enhancement Plantings (5,583 s.f. of shrubs and 2,878 s.f. of trees)</i>				
<u>Common Name</u>	<u>Latin Name</u>	<u>Size</u>	<u>Spacing</u>	<u>Quantity</u>
1. Western red cedar	<i>Thuja plicata</i>	1 gallon	10'	5
2. Paper birch	<i>Betula papyrifera</i>	1 gallon	10'	5
3. Big-leaf maple	<i>Acer macrophyllum</i>	1 gallon	10'	5
4. Vine maple	<i>Acer circinatum</i>	1 gallon	5'	34
5. Osoberry	<i>Oemleria cerasiformis</i>	1 gallon	5'	33
6. Red elderberry	<i>Sambucus racemosa</i>	1 gallon	5'	33
7. Honeysuckle	<i>Lonicera involucrata</i>	1 gallon	5'	33
8. Cascara buckthorn	<i>Rhamnus purshiana</i>	1 gallon	5'	33

ESTIMATED PROJECT COST

Quantity of One-gallon plants	181 @ 8.25/plant
TOTAL ESTIMATED COST OF PLANT MATERIAL AND LABOR	\$1,493.25

PLANTING NOTES

Planting shall take place in the early spring or late fall. Plants should be obtained from a reputable nursery. All plant materials recommended in this plan are typically available from local and regional sources, depending on seasonal demand. Some limited species substitution (including bareroot stock) may be allowed, only with the agreement of the consulting biologist or City of Kirkland biologist. Care and handling of plant materials is extremely important to the overall success of this enhancement project.

The plants shall be arranged with the appropriate numbers, sizes, species, and distribution to achieve the required vegetation coverage. The actual placement of individual plants shall mimic natural, asymmetric vegetation patterns found on similar undisturbed sites in the vicinity.

PROJECT MONITORING PROGRAM

Requirements for monitoring project:

1. Initial compliance report
2. Semi-annual site inspections (spring and fall) for a period of three years
3. Annual reports (one written report submitted in the fall of each monitored year)

The purpose for monitoring this enhancement project shall be to evaluate its success. Success will be determined if monitoring shows at the end of three years that the definition of success (stated below) is met. The property owner shall grant access to the enhancement area for inspection and maintenance to the contracted wetland professional and the City of Kirkland biologist during the monitoring period, or until the project is evaluated as successful.

Criteria for Success: Upon completion of the proposed buffer enhancement project, an inspection by a certified wetland professional shall be made to determine plan compliance. Condition monitoring of the plantings shall be done by a certified wetland professional. Final inspection will occur three years after completion of the project, and the consulting wetland professional will prepare a report as to the success of the project.

Definition of Success: The buffer enhancement area shall support at least 80% of the native plants set forth in the approved restoration plan by the end of three years. The species mix should resemble that proposed in the plan, but strict adherence to obtaining all of the species shall not be a criterion for success. By the end of the third growing season, the percent aerial coverage of native plants shall be 80% in the enhancement area and total invasive species such as reed canarygrass and Himalayan blackberry shall not exceed 10 percent.

Maintenance: The buffer enhancement area will require periodic maintenance during the monitoring period. Maintenance may include, but will not require or be limited to, removal of competing grasses and invasive vegetation (by hand if necessary), irrigation, replacement of plant mortality, fertilization, and/or the replacement of mulch. Aggressive control of invasive grasses and Himalayan blackberry will likely be required in the proposed enhancement area. Appropriate maintenance requirements will be determined by site monitoring

Contingency Plan:

If 20% of the installed plants are severely stressed during any of the inspections, or it appears that 20% may not survive, additional plantings of the same species may be added to the planting areas. Elements of a contingency plan may include, but will not be limited to, more aggressive weed control, animal control, mulching, replanting with larger plant material, species substitution, fertilization, soil amendments, and/or irrigation.

EXISTING WETLAND FUNCTIONS AND VALUES ASSESSMENT

Methodology:

The methodology for this functions and values assessment is based on professional opinion developed through past field analyses and interpretation. This assessment

pertains specifically to the wetland and stream systems on-site, but is typical for assessments of similar systems throughout western Washington.

Analysis:

The wetland on the subject property serves important functions to the surrounding environment such as hydrologic control, water quality improvement, and wildlife habitat.

Hydrologic control (flood control and water supply) is an important function provided by wetlands in western Washington. Wetlands function as natural water storage areas during periods of high precipitation. Wetlands with limited outlets store greater amounts of water than wetlands with unrestricted flow outlets. The depressional characteristics of wetlands often accumulate stormwater runoff. The ponded nature of many wetlands acts to store any excess stormwater that reaches the wetlands. The subject wetland creates a natural water-retention system.

The wetland on-site also provides important water quality features. Water quality is closely tied to hydrologic control. Wetlands are areas into which floodwaters spread during periods of high runoff. As water flows through wetlands, it is slowed by vegetation, and sediment settles to the bottom before the water moves further downstream. Suspended soils in the water may be removed as the water moves through wetlands, resulting in cleaner water entering streams, rivers, and lakes. Due to the on-site wetland, sediment may be trapped and water quality will be improved as the water moves through the site. The cleared buffer area east of Slater Avenue NE does not contain shrubs or trees, and therefore could be improved by the buffer modification and enhancement that is proposed.

Many wildlife species are expected to utilize Forbes Lake and its associated wetland edges, because the site provides valuable habitat for avian, mammal, and amphibian species. Forbes Lake and its associated wetland edges provide movement corridors, which become increasingly important as areas become developed. The on-site wetland contains resources such as food, water, thermal cover, and hiding cover in close proximity, which wildlife species require to thrive. The following are typical avian species that may utilize the on-site habitat: American crow (*Corvus brachyrhynchos*), American robin (*Turdus migratorius*), black-capped chickadee (*Poecile atricapillus*), bushtit (*Psaltriparus minimus*), common raven (*Corvus corax*), rufous-sided towhee (*Pipilo erythrophthalmus*), song sparrow (*Melospiza melodia*), steller's jay (*Cyanocitta stelleri*), winter wren (*Troglodytes troglodytes*), and many different waterfowl species. Mammalian species that may utilize this site include species that easily adapt to suburban environments such as bats (*Myotis spp.*), deer mice (*Peromyscus maniculatus*), eastern cottontail rabbits (*Sylvilagus floridanus*), moles (*Scapanus spp.*), raccoons (*Procyon lotor*), shrews (*Sorex spp.*), skunks (*Mephitis spp.*), squirrels (*Sciuris carolinensis*, *Tamiasciurus douglasii*), Virginia opossums (*Didelphis virginiana*), and white-tailed deer (*Odocoileus hemionus*). Although no egg masses, juveniles, or adult amphibians were observed during the field survey, some species are expected to occur within the wetland or adjacent

habitats. The expected amphibian species include the pacific tree frog (*Hyla regilla*), the bullfrog (*Rana catesbeiana*), and the northwestern salamander (*Ambystoma gracile gracile*). These lists are not intended to be all-inclusive, and may omit some bird, mammal, or amphibian species that do utilize the site. Some of the wetland buffer contains valuable wildlife habitat as well. However, the cleared area currently provides little wildlife habitat to most species and could be improved by planting native trees and shrubs.

Along with the functions and values discussed above, the subject wetland provides additional important functions and values such as aesthetic value, recreational opportunities, and educational tools.

Conclusion:

The overall functions and values of the wetland on the subject property are moderate to high.

POST-MODIFICATION WETLAND FUNCTIONS AND VALUES

The proposed buffer modification will not adversely affect the functions and values in any manner. In fact, the hydrologic control, water quality, and wildlife habitat will be improved with the increased number of native plants in the wetland buffer. The buffer area from Slater Avenue NE toward the wetland edge has been cleared and non-native vegetation has invaded the area. Therefore, the applicant is proposing to replace all the non-native vegetation with native trees and shrubs. By doing so, the enhanced buffer area will provide better functions and values than currently exist. In this case, there is no practical or feasible alternative development proposal that would result in less impact to the buffer. Hydrologic control, water quality, and wildlife habitat within the buffer area will be improved by the proposed buffer enhancement.

USE OF THIS REPORT

This Sensitive Areas Study and Buffer Modification Proposal is supplied to Charles Rosinski as a means of determining on-site wetland conditions, as required by the City of Kirkland during the permitting process. This report is based largely on readily observable conditions and, to a lesser extent, on readily ascertainable conditions. No attempt has been made to determine hidden or concealed conditions. Reports may be adversely affected due to the physical condition of the site, which may lead to observation or probing difficulties.

The laws applicable to wetlands are subject to varying interpretations and may be changed at any time by the courts or legislative bodies. This report is intended to provide information deemed relevant in the applicant's attempt to comply with the laws now in effect.

The work for this report has conformed to the standard of care employed by wetland ecologists. No other representation or warranty is made concerning the work or this report and any implied representation or warranty is disclaimed.

Wetland Resources, Inc.



Scott Spooner
Wetland Ecologist



for John Laufenberg
Senior Wetland Ecologist

REFERENCES

Cowardin, et al., 1979. Classification of Wetlands and Deepwater Habitats of the United States. U.S.D.I. Fish and Wildlife Service. FWS/OBS-79/31. December 1979.

National List of Plant Species that Occur in Wetlands, Northwest Region. 1996. U.S. Department of the Interior, Fish and Wildlife Service. Washington, D.C.

Soil Survey: King County Area, Washington. U.S.D.A. Soil Conservation Service. November 1973.

City of Kirkland Zoning Code: Sensitive Areas Ordinance, Chapter 90. Revision Date: May, 2001. Kirkland, WA.

Washington State Wetlands Identification and Delineation Manual. Washington State Department of Ecology. Publication #96-94. March 1997.

Field Data Sheet
 Rosinski Lot 5/Slater Avenue-WRI #03198
 Investigation Date: 08/20/03

Pit	Depth	Texture	Color	Moisture	Species	%	Status	Strata
S1 Wetland	0-18"+	organic/silt	10YR 2/1	sl. moist	<i>Populus balsamifera</i>	20	Fac	tree
					<i>Salix sitchensis</i>	45	FacW	shrub
					<i>Rubus spectabilis</i>	20	Fac+	shrub
					<i>Spiraea douglasii</i>	25	FacW	shrub
					<i>Rubus discolor</i>	tr	FacU	herb
					<i>Ranunculus repens</i>	tr	FacW	herb

Conclusion: Wetland - Parameters for wetland hydrology, hydrophytic vegetation, and hydric soils are met.

S2 Non-Wetland	0-18"	sandy loam	2.5Y 4/3	dry	<i>Populus balsamifera</i>	20	Fac	tree
					<i>Phalaris arundinacea</i>	50	FacW	herb
					<i>Rubus discolor</i>	35	FacU	herb
					<i>Equisetum spp.</i>	15	Fac	herb

Conclusion: Non-Wetland - Parameters for hydric soils and wetland hydrology are not met.



Wetland Resources, Inc.

Delineation / Mitigation / Restoration / Habitat Creation / Permit Assistance

9505 - 19th Avenue SE
Suite 106
Everett, Washington 98208
(425) 337-3174
Fax (425) 337-3045

FAX TRANSMITTAL

DATE: 1.28.04

TO: TONY LEAVITT
CITY OF KIRKLAND

FAX: 425.803.2859

FROM: SCOTT SPOONER
WETLAND RESOURCES, INC.

TEL: 425.337.3174

RE: Wetland Field Data Form for Charlie Rosinski property near Forbes Lake

NUMBER OF PAGES (INCLUDING THIS PAGE): 2

Mr. Leavitt,

I have completed the Wetland Field Data Form for the Charlie Rosinski project on Slater Avenue near Forbes Lake. I am only including the first page of the form stating that we called the wetland a Type 1 wetland. If you need any of the other pages for any reason, please call me as we do have those sheets filled out and on file. If you have any questions regarding any information in this fax, please contact John Laufenberg or me at any time.

Thanks,

Scott Spooner
Wetland Ecologist
Wetland Resources, Inc.

Kirkland Zoning Code

Plate 25

WETLAND FIELD DATA FORM



WETLAND FIELD DATA FORM

BEGIN BY CHECKING ANY OF THE FOLLOWING (a. - e.) THAT APPLY:

- a. The wetland is contiguous to Lake Washington;
- b. The wetland contains at least 1/4 acre of organic soils, such as peat bogs or mucky soils;
- c. The wetland is equal to or greater than 10 acres in size and having three or more wetland classes, as defined by the U.S. Fish & Wildlife Service (Cowardin et al., 1979), one of which is open water;
- d. The wetland has significant habitat value to state or federally listed threatened or endangered wildlife species; or
- e. The wetland contains state or federally listed threatened or endangered plant species.

IF ANY OF THE CRITERIA LISTED ABOVE ARE MET, THEN THE WETLAND IS CONSIDERED TO BE TYPE 1. IF THAT IS THE CASE, PLEASE CONTINUE TO COMPLETE THE ENTIRE FORM, BUT DO NOT ASSIGN POINTS.

IF THE WETLAND DOES NOT MEET THE CRITERIA LISTED ABOVE FOR TYPE 1, COMPLETE THE ENTIRE FORM, USING THE ASSIGNED POINTS TO DETERMINE IF IT IS A TYPE 2 OR TYPE 3 WETLAND.

Type 2 wetlands typically have at least two wetland vegetation classes, are at least partially surrounded by buffers of native vegetation, connected by surface water flow (perennial or intermittent) to other wetlands or streams, and contain or are associated with forested habitat.

1. Total wetland area

Estimate wetland area and score from choices

Acres	Point Value	Points
>20.00	= 6	
<u>10-19.99</u>	= 5	
5-9.99	= 4	
1-4.99	= 3	
0.1-0.99	= 2	
<0.1	= 1	

2. Wetland classes: Determine the number of wetland classes that qualify, and score according to the table.

	# of Classes	Points
Open Water: If the area of open water is >1/3 acre or >10% of the total wetland area	1	= 1
Aquatic Beds: If the area of aquatic beds is >10% of the open water area or >1/2 acre	2	= 3
Emergent: If the area of emergent class is >1/2 acre or >10% of the total wetland area	3	= 5
Scrub-Shrub: If the area of scrub-shrub class is >1/2 acre or >10% of the total wetland area	4	= 7
Forested: If the area of forested class is >1/2 acre or >10% of the total wetland area	<u>5</u>	= 10

AGREEMENT FOR PREPARATION OF WETLAND STUDY REVIEW FOR
95xx Slater Avenue NE, Kirkland, WA

Charles B. Rosinski, hereinafter referred to as "Proponent," and the City of Kirkland, hereinafter referred to as "City," agree and contract as follows:

- I. The City's Planning Official has determined that a wetland may exist on or near the subject property, pursuant to Kirkland Zoning Code Section 90.40, and/or the City's SEPA review authority.
- II. The City is to direct and supervise preparation of a review of the submitted wetland delineation completed by Wetland Resources and/or as identified in the attached Task Authorization. This review will be completed by an independent consultant, Adolfson Associates, hereinafter referred to as "Consultant," according to the terms of an umbrella contract, available from the City for review by the Proponent.
- II.B. Paragraph IIB shall be applicable while the Proponent's application is pending or throughout the life of this contract, whichever is later. The work of the Consultant and the aforementioned wetland delineation review are for the purpose of providing the City with information and analysis, independent from the Proponent and the owner of the subject property. To that end, the Proponent shall refrain from entering into any agreement for any other services with the Consultant with respect to the subject property. In addition, the Proponent shall refrain from entering into any other agreement with the Consultant for services with respect to other property or proposed developments without full disclosure thereof to the City. The Proponent specifically agrees not to communicate with the Consultant, except for such communication as may be necessary for the Consultant to carry out the performance of this Agreement. Any such communication between the Proponent and Consultant shall be carried on only in the presence of or with the prior approval of the City.
- III. The Proponent agrees to pay to the City in the manner set forth in Section VI below, the reasonable costs of having the aforementioned review prepared. Proponent understands and agrees to pay the City for services, costs, and expenses in accordance with the scope of services set forth in the attachment hereto, provided, however, that the total amount for preparation of the aforementioned review shall not exceed the sum of **\$1,036.00**.

Proponent agrees to disbursement from time to time of funds on deposit in said account to pay for Consultant services covered by the Agreement. Disbursement will typically be made by the City on a monthly basis for payment of Consultant's invoices for services and costs. The City will provide the Proponent a description of services rendered and a project progress report.
- IV. The Proponent agrees to cooperate reasonably with both the City and the Consultant so as to cause the efficient and prompt preparation of the aforementioned review. The Proponent agrees that the City will make available to the Consultant all relevant information in the City's files.
- V. The scope of services contemplated by this Agreement shall include preparation of aforementioned review which shall be delivered to the City and available to the Proponent, as attached herein.
- VI. Proponent will, within ten days of the signing of this Agreement:

Deposit with the City of Kirkland funds sufficient to pay for the cost of preparation of the aforementioned review. If the Proponent fails to deposit such funds with the City within the required ten (10) days, this Agreement shall terminate.
- VII. The Proponent agrees that the aforementioned review and all supporting material submitted by the Consultant in the course of performing services under this Agreement shall be, in the hands of the City of Kirkland, public domain, and not subject to copyright.

ENCLOSURE <u>2</u>
<u>STAFF MEMO - 9/15/05</u>



ATTACHMENT B*

TASK AUTHORIZATION NO. 23004- Task #262 *Environmental Solutions*

CITY City of Kirkland
123 - 5th Avenue
Kirkland, WA 98033

CONSULTANT Adolfson Associates, Inc.
ADOLFSON CONTACT Teresa Vanderburg
5309 Shilshole Avenue NW
Seattle, WA 98107

PROJECT Rosinski single-family residence

PROJECT PROPONENT Charlie Rosinski

TASK AUTHORIZATION NO. 23004- Task #262

CITY PLANNER Tony Leavitt

TASK SCOPE	Preliminary technical review		
	1 staff	1 hrs	\$ 78.00
2	Conduct site visit		
	1 staff	4 hrs	\$ 312.00
3	Review wetland report		
	1 staff	1 hrs	\$ 78.00
4	Prepare review letter to city		
	1 staff	5 hrs	\$ 390.00
5	Telephone Consultation		
	1 staff	1 hrs	\$ 78.00
6	Reimbursables		\$ 100.00

TOTAL COST Not to exceed \$ 1,036.00
without a prior written amendment to this Task Authorization

TASK SCHEDULE All task elements to be completed upon three weeks of receipt of task authorization

DELIVERABLES Letter Report

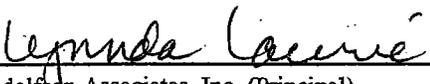
AUTHORIZATION



City of Kirkland (Lynn Stokesbary, Assistant City Manager*)
(Eric Shields, Planning Director#)

12/15/03

Date



Adolfson Associates, Inc. (Principal)

12/1/03

Date

*Attachment B (Individual Task Authorization) to contract between City of Kirkland and Adolfson Associates, Inc. effective July 17, 2003 through June 30, 2004.

*if more than \$20,000

#if equal to or less than \$20,000 **ADOLFSON ASSOCIATES, INC.** 5309 Shilshole Avenue NW, Suite 200 Seattle, WA 98107



Environmental Solutions

January 21, 2004

RECEIVED

JAN 22 2004

Tony Leavitt
City of Kirkland
Planning and Community Development
123 5th Avenue
Kirkland, Washington 98033-6189

AM _____ PM
PLANNING DEPARTMENT
BY _____

RE: REVIEW OF ROSINSKI – LOT 5/SLATER AVENUE, KIRKLAND, WASHINGTON

Dear Tony,

Adolfson Associates, Inc. (Adolfson) is pleased to present the following summary of our site visit and initial review of the Sensitive Areas Study and Buffer Modification Plan for Rosinski – Lot 5/Slater Avenue located at Slater Avenue NE and NE 97th Street, prepared by Wetland Resources, Inc. (WRI) in August 2003.

Field Observations

I met you on the subject property on January 14, 2003 to assess current site conditions, verify wetland delineation boundaries, and the wetland buffer area proposed for modification. The site is a residential lot approximately 0.7-acre in size located southeast of the intersection of Slater Avenue NE and NE 97th Street. The site is bounded by two single-family residences to the north and south and by Slater Avenue to the west. The property extends east into the center of Forbes Lake. Most of the vegetation on the site consists of shrubs with a few mature black cottonwood trees. The western third of the property slopes gently to the east. This portion of the property contains Himalayan blackberry and reed canarygrass.

WRI identified one wetland, associated with Forbes Lake, as occurring on the site. The wetland is considered a Type I wetland. Together the lake itself, this wetland combine to cover the eastern two thirds of the property. Our field investigation concluded that the WRI wetland flags accurately delineate the wetland boundary on site. We also agree that the wetland is a Type 1 wetland under to City of Kirkland Zoning Code Chapter 90. This wetland is in a primary basin (Forbes Creek) and is protected by a 100-foot buffer. This wetland is identified as Forbes 17 wetland in *Kirkland's Streams, Wetlands, and Wildlife Study* by The Watershed Company, dated July 1998.

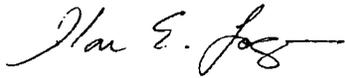
A disturbed area containing fill gravel and hay occurs the non-wetland portion of the site. It is approximately 10 feet wide and extends from the southwest corner of the property to the northeast for approximately 30 feet. It is within the 100-foot wetland buffer of the Forbes Lake wetland on site. We understand that this is an area of unauthorized grading that was conducted by the applicant in 2003. The current erosion control measures in place appear to be sufficient to protect the onsite wetland and Forbes Lake as an interim measure. We understand that this property will be developed for a single family residential home. If the property is not developed, this area should be revegetated to preserve the functions and values of the wetland buffer.

Tony Leavitt
Rosinski – Lot 5/Slater Avenue
01/21/04
Page 2

In reviewing the *Sensitive Area Study and Buffer Modification Plan*, we were unable to determine if the wetland has been formally surveyed by a professional land surveyor, as required by KZC 90.40 3(c). We recommend that the property owner provide a professional survey of the wetland boundary flags. In addition, the report does not contain a completed Wetland Field Data Form as required by KZC 90.40 3(h). We therefore recommend that the property owner's wetland consultant provide the completed wetland data form.

Thank you for the opportunity to review this proposed stream buffer modification plan for the Rosinski single family residence. If you have any questions you may contact me or Teresa Vanderburg at 206-789-9658.

Sincerely,
ADOLFSON ASSOCIATES, INC.

A handwritten signature in black ink, appearing to read "Ilon E. Logan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ilon E. Logan
Project Scientist

ORDINANCE NO. 3658

AN ORDINANCE OF THE CITY OF KIRKLAND, RELATING TO SENSITIVE AREAS, AND REPLACING CHAPTER 90 OF THE KIRKLAND ZONING CODE WITH INTERIM SENSITIVE AREAS REGULATIONS (FILE NO. IV-95-104)

WHEREAS, the City Council has the authority to adopt interim regulations pursuant to RCW 35A.63.220; and

WHEREAS, in regular public meeting on February 18, 1997, the City Council determined that there is a need for interim regulation of development within wetlands, wetland buffers, stream buffers, and minor lake buffers, and adopted interim regulations by Ordinance No. 3575; and

WHEREAS, in regular public meetings on August 5, 1997, and on January 20, 1998, the City Council extended the interim regulations for an additional six-month period by Ordinance No. 3592 and Ordinance No. 3620, respectively; and

WHEREAS, in regular public meeting on May 19, 1998, the City Council extended the interim regulations for an additional 120-day period by Ordinance No. 3632, in order to have an opportunity to consider and act on new interim regulations that will be more flexible and will protect the particular functions and values of each drainage basin; and

WHEREAS, the City Council considered *Kirkland's Streams, Wetlands and Wildlife Study*, prepared by The Watershed Company and dated July 1998, and *City of Kirkland Sensitive Areas Recommendations Report*, prepared by Adolfson Associates, Inc. and dated August 1998, in developing the new interim regulations; now, therefore

BE IT ORDAINED by the City Council of the City of Kirkland, Washington, as follows:

Section 1. Adoption. Chapter 90 of the Kirkland Zoning Code is replaced in its entirety by a new interim Chapter 90 as follows:

ENCLOSURE 4

STAFF MEMO - 9/15/05

CHAPTER 90 - DRAINAGE BASINS

I:	User Guide
II:	Purpose
III:	Applicability
IV:	General Exceptions
V:	Sensitive Areas Maps and Other Resources
VI:	Definitions
VII:	Activities in or Near Wetlands, Totem Lake, and Forbes Lake
VIII:	Activities in or Near Streams
IX:	Frequently Flooded Areas
X:	Site Requirements and Sensitive Areas Protection Techniques
XI:	Maximum Development Potential
XII:	Reasonable Use
XIII:	Bond or Performance Security
XIV:	Dedication
XV:	Liability
XVI:	Appeals
XVII:	Setbacks and Buffers Required by Prior Approvals

I. USER GUIDE

These regulations apply to activities, work, and conditions in or near any stream, wetland, frequently flooded area, or lake in the City. These regulations add to and in some cases supersede other City regulations. Anyone interested in conducting any development activity on or near a wetland, stream, lake, or frequently flooded areas; wishing to participate in the City's decision on a proposed development on or near any of these areas; or wishing to have a determination made as to the presence of one of these areas on their property, should read these regulations.

II. PURPOSE

These regulations were prepared to comply with the Growth Management Act, RCW Chapter 36.70A. The purpose of these regulations is to protect the environment, human life, and property. This purpose will be achieved by preserving the important ecological functions of wetlands, streams, lakes, and frequently flooded areas. The designation and classification of these sensitive areas is intended to assure their preservation and protection from loss or degradation, and to restrict incompatible land uses.

Sensitive areas perform a variety of valuable biological, chemical, and physical functions that benefit the City and its residents. The functions of sensitive areas include, but are not limited to, the following.

- A. Wetlands. Wetlands help maintain water quality; store and convey storm and flood water; recharge ground water; provide fish and wildlife habitat; and serve as areas for recreation, education, scientific study, and aesthetic appreciation. The City's goal is to achieve no net loss of wetlands through retention of wetland functions, values, and acreage within each drainage basin. Wetlands are protected in part by buffers, which are upland areas adjacent to wetlands.

Wetland buffers serve to moderate runoff volume and flow rates; reduce sediment loads; remove waterborne contaminants such as excess nutrients, synthetic organic chemicals (e.g., pesticides, oils, and greases), and metals; provide shade for surface water temperature moderation; provide wildlife habitat; and deter harmful intrusion into wetlands.

The primary purpose of wetland regulations is to achieve a goal of no net loss of wetland function, value, and acreage within each drainage basin, which, where possible, includes enhancing and restoring wetlands.

- B. Streams. Streams and their associated buffers provide important fish and wildlife habitat and travel corridors; help maintain water quality; store and convey storm and flood water; recharge groundwater; and serve as areas for recreation, education, scientific study, and aesthetic appreciation. Streams are protected in part by buffers, which are adjacent upland areas that interact with streams.

Stream buffers - sometimes known as riparian buffers - serve to moderate runoff volume and flow rates; reduce sediment loads; remove waterborne contaminants such as excess nutrients, synthetic organic chemicals (e.g., pesticides, oils, and greases), and metals; provide shade for surface water temperature moderation; provide wildlife habitat; and deter harmful intrusion into streams.

The primary purpose of stream regulations is to avoid reducing stream and riparian corridor functions, and where possible, to enhance and restore streams and riparian areas.

- C. Lakes. Lakes provide important fish and wildlife habitat; store and convey storm and flood water; recharge ground water; store ground water discharge; and serve as areas for recreation, education, scientific study, and aesthetic appreciation. Many activities in and around lakes are regulated under the wetland regulations, because the shallow perimeter of most lakes (the littoral zone) often meets the definition of a wetland. Lake Washington is a Shoreline of the State, and is subject to the Shoreline Management Act. Activities on or in Lake Washington are regulated by the use zone regulation for the zones that include Lake Washington (see the Kirkland Zoning

Code). Activities in wetlands contiguous to Lake Washington are subject to both the Shoreline Master Program and the wetland regulations; where these regulations differ, the more protective of wetlands shall apply.

The primary purpose of the lake regulations is to avoid impacts to lakes and contiguous riparian areas, and where possible, to enhance and restore lakes.

- D. Frequently Flooded Areas. Frequently flooded areas help to store and convey storm and flood water; recharge ground water; provide important riparian habitat for fish and wildlife; and provide areas for recreation, education, and scientific study. Development within these areas can be hazardous to those inhabiting such areas, and to those living upstream and downstream. Flooding also can cause substantial damage to public and private property that results in significant costs to the public as well as to private individuals.

The primary purpose of frequently flooded areas regulations is to regulate development in the 100-year floodplain to avoid substantial risk and damage to public and private property and loss of life.

III. APPLICABILITY

- A. General. These regulations apply to any property that contains or is within 100 feet of any of the following:

1. Streams;
2. Type 1 or 2 wetlands;
3. Type 3 wetlands greater than 1,000 square feet in a Primary Basin;
4. Type 3 wetlands greater than 2,500 square feet in a Secondary Basin;
5. Totem Lake and Forbes Lake; and
6. Frequently flooded areas.

- B. Conflict with the Kirkland Zoning Code. The provisions of these regulations supersede any conflicting provisions of the Kirkland Zoning Code. If more than one provision of these regulations applies to the subject property, then the regulation that provides the greatest protection to sensitive areas shall apply.

- C. Other Jurisdictions. Nothing in these regulations eliminates or otherwise affects the responsibility of the applicant to comply with all other applicable local, state, and federal laws regulating development activities in sensitive areas, as herein defined.

- D. SEPA Compliance. Nothing in these regulations or the decisions made pursuant to these regulations affects the authority of the City to review, condition, and deny projects under the State Environmental Policy Act, RCW Chapter 43.21C.

IV. GENERAL EXCEPTIONS

The following activities or conditions shall be exempt from this Chapter:

- A. Activities involving artificially created wetlands or streams intentionally created from non-wetland sites, including but not limited to grass-lined swales, irrigation and drainage ditches, retention and/or detention facilities, farm ponds, and landscape features, *except* wetlands or streams that are created as mitigation for impacts to regulated sensitive areas, or that support state or federally listed threatened or endangered species.
- B. Legally filled wetlands or wetlands created after July 1, 1990 that were unintentionally created as a result of the construction of a road, street, or highway.
- C. Activities affecting Type 3 wetlands that are 1,000 square feet or less in any of the Primary Basins, or affecting Type 3 wetlands that are 2,500 square feet or less in any of the Secondary Basins.
- D. All utility work in improved City rights-of-way; and all normal and routine maintenance, operation and reconstruction of existing roads, streets, and associated rights-of-way and structures; and public and private connections to existing public utilities, where no feasible alternative location exists based on an analysis of technology and system efficiency; provided, that the Planning Official determines that (1) such activities will not increase the impervious area or reduce flood storage capacity, and (2) the construction drawings specify that all affected sensitive areas and buffers will be expeditiously restored to their pre-project condition or better. For purposes of this Subsection only, "improved City rights-of-way" include those rights-of-way that have improvements only underground, as well as those with surface improvements.
- E. Normal and routine maintenance or repair of buildings or driveways; provided, that such activities do not increase the previously approved building footprint within a sensitive area or its buffer. Increases in building footprint outside of such areas shall be allowed, even if all or a portion of the previously approved footprint is within such areas.

- F. Site investigative work and studies necessary for preparing and processing land use applications, including, but not limited to hand dug holes for soils tests, water quality sampling, wildlife studies, and wetland and stream investigations; provided, that any disturbance of the sensitive area or its buffer shall be the minimum necessary to carry out the work or studies.
- G. Educational activities, scientific research, and passive outdoor recreational activities such as bird watching.
- H. Emergency activities necessary to prevent an immediate threat to public health, safety, or welfare.

V. SENSITIVE AREAS MAPS AND OTHER RESOURCES

As part of the City's SEPA Ordinance, the City Council adopted, and may amend, a map folio entitled "Kirkland Sensitive Areas." Some of the maps in this folio depict wetlands, streams, and 100-year floodplains. The most recent amendment to this map folio is a 1998 study of wetlands and streams throughout the City's drainage basins. The map folio, subsequent amendments, and other available resources (such as topographic maps, soils maps, and air photos) are intended only as guides. They depict the *approximate* location and extent of known wetlands and streams. Some sensitive areas depicted in these resources may no longer exist; further, sensitive areas not shown in these resources may occur. Property owners and project applicants are strongly advised to retain qualified professionals to conduct site-specific studies for the presence of sensitive areas.

VI. DEFINITIONS

- A. Basin -- A specific area of land drained by a particular watercourse and its tributaries.
- B. Buffer -- The area immediately adjacent to wetlands and streams that protects these sensitive areas and provides essential habitat elements for fish and/or wildlife.
- C. Building Setback Line (BSBL) -- A setback distance of 10 feet from a designated or modified wetland or stream buffer within which no buildings or other above-ground structures, with the exception of fencing or other minor improvements, may be constructed. The BSBL serves to protect the wetland or stream buffer during development activities and routine maintenance occurring adjacent to these resources.
- D. Class A Streams -- Streams that are used by salmonids. Class A streams generally correlate with Type 3 streams as defined in the Washington State Hydraulic Code.

- E. Class B Streams - Perennial streams (during years of normal precipitation) that are not used by salmonids. Class B streams generally correlate with Type 4 streams as defined in the Washington State Hydraulic Code.
- F. Class C Streams - Intermittent or ephemeral streams (during years of normal precipitation) not used by salmonids. Class C streams generally correlate with Type 5 streams as defined in the Washington State Hydraulic Code.
- G. Frequently Flooded Areas - All areas shown on the Kirkland Sensitive Areas maps as being within a 100-year floodplain, as well as all areas regulated by Chapter 21.56 of the Kirkland Municipal Code.
- H. Minor Improvements - Walkways, pedestrian bridges, benches, and similar features as determined by the Planning Official, that present minimal disturbance to the area affected.
- I. Primary Basins - The watersheds associated with the following five creeks: (1) Juanita Creek, (2) Forbes Creek, (3) Cochran Springs Creek, (4) Yarrow Creek, and (5) Carillon Creek, as shown in the Kirkland Sensitive Areas maps.
- J. Qualified Professional -- An individual with relevant education and training, as determined by the Planning Official, and with at least three years experience in biological fields such as botany, fisheries, wildlife, soils, ecology, and similar areas of specialization, and including a professional Wetland Scientist.
- K. Salmonid - A member of the fish family salmonidae, which include Chinook, coho, chum, sockeye, and pink salmon; rainbow, steelhead, and cutthroat trout; brown trout; brook and Dolly Varden char, kokanee, and white fish.
- L. Secondary Basins - The Moss Bay Basin, Houghton Basin, and Kirkland Slope Basin, which are also depicted as the Urban Drainage Basins on the Kirkland Sensitive Areas maps.
- M. Sensitive Areas - Wetlands, streams, lakes, and frequently flooded/flood hazard areas.
- N. Significant Habitat Area - An area that provides food, protective cover, nesting, breeding, or movement for threatened, endangered, sensitive, monitor, or priority species of plants, fish, or wildlife, or a species of local significance due to its rarity within the City. The terms threatened, endangered, sensitive, monitor, and priority pertain to lists, categories, and definitions of species promulgated by the Washington

Department of Wildlife (Non-Game Data Systems Special Animal Species), as identified in WAC Sections 232-12-011 or 232-12-014, or in the Priority Habitat and Species (PHS) program of the Washington State Department of Wildlife, or in rules and regulations adopted from time to time by the U.S. Fish and Wildlife Service.

- O. Streams – Areas where surface waters produce a defined channel or bed that demonstrates clear evidence of the passage of water, including but not limited to bedrock channels, gravel beds, sand and silt beds, and defined-channel swales. The channel or bed need not contain water year-round. Streams do not include irrigation ditches, canals, storm or surface water runoff devices, or other entirely artificial water courses, unless they are used by salmonids or convey a naturally-occurring stream that has been diverted into the artificial channel.
- P. Type 1 Wetlands – Wetlands that meet any of the following conditions:
1. Wetlands contiguous to Lake Washington;
 2. Wetlands containing at least ¼ acre of organic soils, such as peat bogs or mucky soils;
 3. Wetlands equal to or greater than 10 acres in size and having three or more wetland classes, as defined by the U.S. Fish & Wildlife Service (Cowardin et al., 1979), one of which is open water;
 4. Wetlands that have significant habitat value to state or federally-listed threatened or endangered wildlife species; or
 5. Wetlands that contain state or federally listed threatened or endangered plant species.
- Q. Type 2 Wetlands – Wetlands that do not meet any of the criteria for Type 1 Wetlands, yet provide significant habitat function and value, and that merit at least 22 points as determined by using the City's Wetland Field Data Form, which is Appendix A at the end of this Chapter.
- R. Type 3 Wetlands – Wetlands that do not meet the criteria for either Type 1 or Type 2 wetlands and that merit fewer than 22 points as determined by using the City's Wetland Field Data Form, which is Appendix A at the end of this Chapter.
- S. Watershed -- A region or area bounded on the periphery by a parting of water and draining to a particular watercourse or body of water.
- T. Wetlands – Those areas that are inundated or saturated by surface or groundwater at a frequency and duration to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soils conditions.

Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from non-wetland sites, including but not limited to irrigation and drainage ditches, grass-lined swales, canals, retention and/or detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. However, wetlands do include those artificial wetlands intentionally created from non-wetland sites as mitigation for the conversion of wetlands.

VII. ACTIVITIES IN OR NEAR WETLANDS, TOTEM LAKE, AND FORBES LAKE

Wetland Determinations, Delineations, Regulations, Criteria, and Procedures. All determinations and delineations of wetlands shall be made using the criteria and procedures contained in the *Washington State Wetlands Identification and Delineation Manual* (Washington Department of Ecology, 1997). All determinations, delineations, and regulations of wetlands shall be based on the entire extent of the wetland, irrespective of property lines, ownership patterns, and the like.

- A. Determination of Wetlands. Either prior to or during review of a development application, the Planning Official shall determine whether a wetland or its buffer is present on the subject property using the following provisions.
1. During or immediately following a site inspection, the Planning Official shall make an initial assessment as to whether any portion of the subject property or surrounding area (which shall be the area within 100 feet of the subject property) meets the definition of a wetland. If this initial site inspection does not indicate the presence of a wetland on the subject property or surrounding area, no additional wetland studies will be required. However, if the initial site inspection or information subsequently obtained indicates the presence of a wetland on the subject property or surrounding area, then the applicant shall follow the procedure in paragraph 2 below.
 2. If the initial site inspection or information subsequently obtained indicates that a wetland may exist on or near the subject property or surrounding area, the applicant shall either (1) fund a study and report prepared by the City's wetland consultant, or (2) submit a report prepared by a qualified professional approved by the City, and fund a review of this report by the City's wetland consultant.

3. If a wetlands study and report are required, at a minimum the report shall include the following:
 - a) A summary of the methodology used to conduct the study;
 - b) A professional survey which is based on the KCAS or plat bearing system and tied to a known monument, depicting the wetland boundary on a map of the surrounding area which shows the wetland and its buffer;
 - c) A description of the wetland habitat(s) found throughout the entire wetland (not just on the subject property) using the U.S. Fish & Wildlife Service classification system (*Classification of Wetlands and Deepwater Habitats in the U.S.*, Cowardin et al., 1979);
 - d) A description of nesting, denning, and breeding areas found in the wetland or its surrounding area;
 - e) A description of the surrounding area, including any drainage systems entering and leaving the wetland, and a list of observed or documented plant and wildlife species;
 - f) A description of historical, hydrologic, vegetative, topographic, and soil modifications, if any;
 - g) A proposed classification of the wetland as a Type 1, 2, or 3 wetland, including the rationale for the proposed classification; and
 - h) A completed Wetland Field Data Form, which is Appendix A at the end of this Chapter.

4. Formal determination of whether a wetland exists on the subject property, as well as its boundaries, habitat classes, and rating, shall be made by the Planning Official after review of the report prepared under paragraph 3 of this Section. A decision of the Planning Official may be appealed pursuant to Section XVI of this Chapter. The Planning Official's decision under this section shall be used for review of any development activity proposed on the subject property for which an application is received within two years of the decision; provided, that the Planning Official may modify any decision whenever physical circumstances have markedly and demonstrably changed on the subject property or the surrounding area as a result of natural processes or human activity.

B. Standard Wetland Buffers. Required, or standard, buffers for wetlands are as follows.

Wetland Type	Primary Basin	Secondary Basin
1	100'	75'
2	75'	50'
3	50'	25'

- C. Building Setback Line (BSBL). Structures shall be set back at least 10 feet from the designated or modified wetland buffer. This BSBL shall not be modified except through provisions for reasonable use.
- D. Minor Improvements. Minor improvements may be located within the sensitive area buffers of Section VII.B. These minor improvements shall be located within the outer one-half of the sensitive area buffer, except where approved stream crossings are made. The Planning Official shall approve a proposal to construct a minor improvement within an environmentally sensitive area buffer if:
1. It will not adversely affect water quality;
 2. It will not destroy or damage a significant wildlife habitat area;
 3. It will not adversely affect drainage or storm water detention capabilities;
 4. It will not lead to unstable earth conditions or create erosion hazards; and
 5. It will not be materially detrimental to any other property in the area of the subject property or to the City as a whole, including the loss of significant open space or scenic vistas.

The Planning Official's decision may be appealed in accordance with Section XVI of this Chapter.

The Planning Official may require the applicant to submit a report prepared by a qualified professional which describes how the proposal will or will not comply with the criteria for approving a minor improvement.

- E. Modification of Type 1 Wetlands. No land surface modification shall occur and no improvement shall be located in a Type 1 wetland, except as provided in this Section. Furthermore, all modifications of a Type 1 Wetland shall be consistent with *Kirkland's Streams, Wetlands and Wildlife Study* (The Watershed Company, 1998) and the *Kirkland Sensitive Areas Regulatory Recommendations Report* (Adolfson Associates, Inc., 1998).

An applicant may request a modification of the requirements of this Section. The Hearing Examiner shall review a modification request, and when deemed appropriate, issue a Modification Request Approval under a Process IIA, described in Chapter 150 of the Kirkland Zoning Code. As part of the Modification Request, the applicant shall submit a report prepared by a qualified professional approved by the Planning Official, and fund a review of this report by the City's wetland consultant. In either event, the report shall contain all information required in Section VII.A.3 as well as an assessment of the habitat, water quality, storm water detention, ground water recharge, shoreline protection, and erosion protection functions of the wetland and its

buffer. The report shall also assess the effects on those functions of the proposed modification. In addition to criteria of Process IIA, the Hearing Examiner shall approve an improvement or land surface modification in a wetland only if:

1. It will not adversely affect water quality;
 2. It will not destroy, damage, or disrupt a significant habitat area;
 3. It will not have an adverse effect on drainage and/or storm water detention capabilities;
 4. It will not lead to unstable earth conditions or create an erosion hazard;
 5. It will not be materially detrimental to any other property or the City as a whole;
 6. It will result in land surface modification of no more than 5% of the wetland on the subject property;
 7. Compensatory mitigation is provided in accordance with the table in Section I below;
 8. Fill material does not contain organic or inorganic material that would be detrimental to water quality or fish and wildlife habitat;
 9. All exposed areas are stabilized with vegetation normally associated with native wetlands and/or buffers, as appropriate; and
 10. There is no practicable or feasible alternative development proposal that results in less impact to the Type 1 wetland and its buffer.
- F. Modification of Type 2 Wetlands. No land surface modification shall occur and no improvement shall be located in a Type 2 wetland, except as provided in this Section.

An applicant may request a modification of the requirements of this Section. The Hearing Examiner shall review a modification request, and when deemed appropriate, issue a Modification Request Approval under Process IIA, described in Chapter 150 of the Kirkland Zoning Code. The requirements for requesting such a modification are identical to those listed above for a Type 1 wetland with the following exceptions:

1. In Primary Basins, the modification shall not affect more than 10% of the wetland on the subject property; and
2. In Secondary Basins, the modification shall not affect more than 25% of the wetland on the subject property.

- G. Modification of Type 3 Wetlands. No land surface modification shall occur and no improvement may be located in a Type 3 wetland, except as provided in this Section.

An applicant may request a modification of the requirements of this Section. The Planning Official shall review a modification request, and when deemed appropriate, issue a Modification Request Approval in conjunction with approval of the applicable

development permit. The requirements for requesting such a modification are identical to those listed above for a Type 1 wetland with the following exceptions:

1. In Primary Basins, the modification shall not affect more than 50% of the wetland on the subject property; and
2. In Secondary Basins, the modification may affect all of the wetland on the subject property.

Decisions on requests to modify Type 3 Wetlands may be appealed in accordance with Section XVI of this Chapter.

H. Compensatory Mitigation Ratios. All approved impacts to regulated wetlands require compensatory mitigation so that the goal of no net loss of wetland function, value, and acreage may be achieved. Mitigation shall be implemented through the creation of wetlands (from non-wetland areas) or through the restoration of wetlands (from uplands that were formerly wetlands). The following mitigation ratios (the ratio of the mitigated area to the impacted area) shall apply:

Wetland Type	Primary Basins	Secondary Basins
1	3:1	3:1
2	2:1	1.5:1
3	1.5:1	1:1

Compensatory mitigation as wetland enhancement (that is, the improvement of existing wetlands) shall also be allowed. In Primary Basins, no more than 1/3 of the mitigation may consist of enhancement; in Secondary Basins, no more than 1/2 of the mitigation may consist of enhancement.

On-site mitigation is presumed to be preferable to off-site mitigation. The decision maker may approve a plan to implement all or a portion of the required mitigation off-site, if the off-site mitigation is within the same drainage basin as the property that will be impacted by the project. The applicant shall demonstrate that the off-site mitigation will result in higher wetland functions, values, and/or acreage than on-site mitigation. Required compensatory mitigation ratios shall be the same for on-site or off-site mitigation, or a combination of both.

If the proposed on-site or off-site mitigation plan will result in the creation or expansion of a wetland or its buffer on any property other than the subject property, the plan shall not be approved until the applicant submits to the Planning Official a copy of a statement signed by the owners of all affected properties, in a form approved by the City Attorney and recorded in the King County Department of

Elections and Records, consenting to the wetland and/or buffer creation or increase on such property.

- I. **Mitigation Plan Requirements.** Applicants proposing to alter wetlands or their buffers shall submit a sensitive area mitigation plan prepared by a qualified professional. The mitigation plan shall consist of a description of the sensitive areas and buffers affected by the proposed project, the nature and extent of impacts to those areas, and the mitigation measures to offset those impacts. The mitigation plan shall also contain success criteria by which the mitigation will be assessed, and plans for a five-year monitoring and maintenance program. The monitoring program shall consist of at least two site visits per year by a qualified professional, with annual progress reports submitted to the Planning Official and all other agencies with jurisdiction.

The mitigation plan shall also contain a drawing that illustrates the compensatory mitigation elements. The plan and/or drawing shall list plant materials and other habitat features to be installed. The cost of the plan, program, reports, and drawing shall be borne by the applicant.

- J. **Modification of Wetland Buffers:** Wetland buffer impact is assumed to occur when wetland fill/modification is proposed. Any proposal for wetland fill/modification shall include provisions for establishing a new wetland buffer zone to be located around the compensatory mitigation sites and to be equal in width to its standard buffer in Section VII.B or a buffer reduced in accordance with this Subsection J by no more than $\frac{1}{3}$ of the standard buffer width in all cases (regardless of wetland type or basin type).

The remainder of this section applies to proposals that involve reduction of only the wetland buffer, and not the wetland itself.

No land surface modification may occur and no improvement may be located in a wetland buffer, except as provided for in this Subsection J. Buffer widths may be decreased if an applicant receives a Modification Request Approval. Any modification (increase or decrease) of a standard buffer shall be consistent with *Kirkland's Streams, Wetlands and Wildlife Study* (The Watershed Company, 1998) and the *Kirkland Sensitive Areas Regulatory Recommendations Report* (Adolfson Associates, Inc., 1998). Buffers may be reduced through one of two means, either (1) buffer averaging, or (2) buffer reduction with enhancement. A combination of these two buffer reduction approaches shall not be used.

1. Buffer averaging requires that the area of the buffer resulting from the buffer averaging be equal in size and quality to the buffer area calculated by the

standards in Section VII.B. Buffers may not be reduced at any point by more than 1/3 of the standards in Section VII.B. Buffer averaging calculations shall only consider the subject property.

2. Buffers may be decreased through buffer enhancement. The applicant shall demonstrate that through enhancing the buffer (by removing invasive plants, planting native vegetation, installing habitat features such as downed logs or snags, or other means) the reduced buffer will function at a higher level than the existing standard buffer. At a minimum, a buffer enhancement plan shall provide the following: 1) a map locating the specific area of enhancement, 2) a planting plan that uses native species, including groundcover, shrubs, and trees, and 3) provisions for monitoring and maintenance. Buffers may not be reduced at any point by more than 1/3 of the standards in Section VII.B.

Modification requests for averaging or reduction/enhancement of Types 1 and 2 Wetland buffers shall be reviewed and decided upon by the Hearing Examiner under Process IIA, described in Chapter 150 of the Kirkland Zoning Code. Modification requests for averaging or reduction/enhancement of Type 3 Wetland buffers shall be reviewed and decided upon by the Planning Official. Decisions on modification requests may be appealed pursuant to the provisions of Section XVI of this Chapter.

- K. Restoration. The Planning Official may permit or require the applicant to restore and maintain a wetland and/or its buffer by removing material detrimental to the area, such as debris, sediment, or vegetation. The Planning Official may also permit or require the applicant to restore a wetland or its buffer through the addition of native plants and other habitat features. Restoration may be required whenever a condition detrimental to water quality or habitat exists.
- L. Public Park. The City may develop access through a wetland and its buffer in conjunction with a public park.
- M. Totem Lake and Forbes Lake. The majority, if not the entirety, of the perimeters of Totem Lake and Forbes Lake meet the definition of wetlands. All activities in the shallow (less than or equal to 6.6 feet) portions of these lakes as well as in their contiguous wetlands (located above the high waterline) are regulated pursuant to Sections VIIA-L above. Activities in deep water portions (water depths greater than 6.6 feet) of these lakes, that is, waterward of the lakes' perimeter wetlands, shall be regulated as follows.
 - 1 The Planning Official may permit or require the applicant to rehabilitate and maintain a lake by removing material detrimental to the lake, such a debris,

sediment, or non-native vegetation. Rehabilitation may be required when a condition detrimental to water quality or habitat exists. Decisions made under this paragraph may be appealed in accordance with Section XVI of this Chapter.

2. Moorage structures are permitted in Totem Lake and Forbes Lake. The Planning Official shall consider requests to construct, replace, or repair existing structures concurrently with the Washington Department of Fish and Wildlife's review of a Hydraulic Project Approval (HPA), or upon notification by that agency that an HPA is not required.
3. The Planning Official shall review applications for moorage structures using Process I, described in Chapter 145 of the Kirkland Zoning Code. The Planning Director shall authorize a moorage structure to be constructed only if (1) it is accessory to a dwelling unit or public park on the subject property, and (2) no significant habitat area will be destroyed.
4. A moorage structure shall extend no farther than is necessary to function properly, but in no event may extend more than 125 feet waterward of the high waterline.
5. A moorage structure shall not be treated with creosote or oil base or toxic substances.
6. Dock and pier decks and the top of other moorage structures shall not be more than two feet above the high waterline.
7. Bulkheads are prohibited unless (1) necessary to prevent significant erosion and (2) the use of vegetation or other "bioengineering" materials and techniques would not sufficiently stabilize the shoreline.

VIII. ACTIVITIES IN OR NEAR STREAMS

- A. General. No land surface modification may occur and no improvements may be located in a stream or its buffer except as provided in this Section.
- B. Stream Determination. The Planning Official shall determine whether a stream or stream buffer is present on the subject property using the following provisions. During or immediately following a site inspection, the Planning Official shall make an initial assessment as to whether a stream exists on any portion of the subject property or surrounding area (which shall be the area within approximately 100 feet of the subject property).

If the initial site inspection indicates the presence of a stream, the Planning Official shall determine, based on the definitions contained in this Chapter and after a review of all information available to the City, the classification of the stream.

If this initial site inspection does not indicate the presence of a stream on or near the subject property, no additional stream study will be required.

If an applicant disagrees with the Planning Official's determination that a stream exists on or near the subject property or the Planning Official's classification of a stream, the applicant shall submit a report prepared by a qualified professional approved by the Planning Official that independently evaluates the presence of a stream or the classification of the stream, based on the definitions contained in this Chapter.

The Planning Official shall make final determinations regarding the existence of a stream and the proper classification of that stream. This determination may be appealed pursuant to the provisions of Section XVI of this Chapter.

- C. Stream Buffers. No land surface modification shall occur and no improvement may be located in a stream or its buffer, except as provided in this Section. Required, or standard, buffers for streams are as follows.

<u>Stream Class</u>	<u>Primary Basins</u>	<u>Secondary Basins</u>
A	75 ft.	N/A
B	60 ft.	50 ft.
C	35 ft.	25 ft.

Stream buffers shall be measured from each side of the top of the stream banks (see Plate 16 of the Kirkland Zoning Code).

- D. Building Setback Line (BSBL). Structures shall be set back at least 10 feet from the designated or modified stream buffer. This BSBL shall not be modified except through provisions for reasonable use.
- E. Minor Improvements. Minor improvements may be located within the sensitive area buffers of Section VIII.C. These minor improvements shall be located within the outer one-half of the sensitive area buffer, except where approved stream crossings are made. The Planning Official shall approve a proposal to construct a minor improvement within a sensitive area buffer if:

1. It will not adversely affect water quality;

2. It will not destroy or damage a significant wildlife habitat area;
3. It will not adversely affect drainage or storm water detention capabilities;
4. It will not lead to unstable earth conditions or create erosion hazards; and
5. It will not be materially detrimental to any other property in the area of the subject property or to the City as a whole, including the loss of significant open space or scenic vistas.

The Planning Official's decision may be appealed in accordance with Section XVI of this Chapter. The Planning Official may require the applicant to submit a report prepared by a qualified professional which describes how the proposal will or will not comply with the criteria for approving a minor improvement.

F. Modification of Stream Buffers.

Buffer widths may be increased when it is determined that wider buffers are necessary to protect stream functions and values. For example, increased buffer widths may be required for buffers located on steep slopes or adjacent to existing or proposed high-impact land uses.

Buffer widths may be decreased if an applicant receives a Modification Request Approval. Any modification (increase or decrease) of the buffers contained in Section VIII.C shall be consistent with *Kirkland's Streams, Wetlands and Wildlife Study* (The Watershed Company, 1998) and the *Kirkland Sensitive Areas Regulatory Recommendations Report* (Adolfson Associates, Inc., 1998).

Buffers may be reduced through one of two means, either (1) buffer averaging, or (2) buffer reduction with enhancement. A combination of these two buffer reduction approaches shall not be used.

1. Buffer averaging requires that the area of the buffer resulting from the buffer averaging be equal in size and quality to the buffer area calculated by the standards in Section VIII.C. Buffers may not be reduced at any point by more than 1/3 of the standards in Section VIII.C. Buffer averaging calculations shall only consider the subject property.
2. Buffers may be decreased through buffer enhancement. The applicant shall demonstrate that through enhancing the buffer (by removing invasive plants, planting native vegetation, installing habitat features such as downed logs or snags, or other means) the reduced buffer will function at a higher level than the standard existing buffer. A buffer enhancement plan shall at a minimum provide the following: 1) a map locating the specific area of enhancement, 2) a planting plan that uses native species, including groundcover, shrubs, and trees, and 3)

provisions for monitoring and maintenance. Buffers may not be reduced at any point by more than 1/3 of the standards in Section VIII.C.

Modification requests for averaging or reduction/enhancement of Class A Stream buffers shall be reviewed and decided upon by the Hearing Examiner under Process IIA, described in Chapter 150 of the Kirkland Zoning Code. Modification requests for averaging or reduction/enhancement of Class B Stream buffers shall be reviewed and decided upon by the Planning Official under Process I, described in Chapter 145 of the Kirkland Zoning Code. Modification requests for averaging or reduction/enhancement of Class C Stream buffers shall be reviewed and decided upon by the Planning Official. Decisions on modification requests may be appealed pursuant to the provisions of Section XVI of this Chapter.

- G. Stream Relocation or Modification. A proposal to relocate or modify a Class C stream shall be reviewed and decided upon by the Planning Official. The decision of the Planning Official may be appealed in accordance with Section XVI of this Chapter. A proposal to relocate or modify a Class A or B stream shall be considered under Process I. The Planning Official shall permit a stream to be relocated or modified only if water quality, conveyance, fish and wildlife habitat, wetland recharge (if hydrologically connected to a wetland), and storm water detention capabilities of the stream, will be significantly improved by the relocation or modification. Convenience to the applicant in order to facilitate general site design may not be considered.

A proposal to relocate or modify a Class A stream shall be approved only if the Washington Department of Fish and Wildlife issues a Hydraulic Project Approval for the project. Furthermore, all modifications shall be consistent with *Kirkland's Streams, Wetlands and Wildlife Study* (The Watershed Company, 1998) and the *Kirkland Sensitive Areas Regulatory Recommendations Report* (Adolfson Associates, Inc., 1998).

If the proposed stream activity will result in the creation or expansion of a sensitive area or its buffer on any property other than the subject property, the Planning Official shall not approve the plan until the applicant submits to the Planning Official a copy of a statement signed by the owners of all affected properties, in a form approved by the City Attorney and recorded in the King County Department of Elections and Records, consenting to the sensitive area and/or buffer creation or increase on such property.

Prior to the Planning Official's approval of a stream relocation or modification, the applicant shall submit a stream relocation/modification plan prepared by a qualified

professional approved by the Planning Official. This plan shall contain or demonstrate the following.

1. A topographic survey showing existing and proposed topography and improvements;
2. The filling and revegetation of the existing stream channel;
3. A proposed phasing plan specifying time of year for all project phases;
4. The ability of the new stream channel to accommodate flow and velocity of 100-year storm events; and
5. The design and implementation features and techniques listed below, unless clearly and demonstrably inappropriate for the proposed relocation or modification:
 - a) The creation of natural meander patterns;
 - b) The formation of gentle and stable side slopes, no steeper than two feet horizontal to one-foot vertical, and the installation of both temporary and permanent erosion control features (the use of native vegetation on streambanks shall be emphasized);
 - c) The creation of a narrow sub-channel (thalweg) against the south or west streambank;
 - d) The utilization of native materials;
 - e) The installation of vegetation normally associated with streams, emphasizing native plants with high food and cover value for fish and wildlife;
 - f) The creation of spawning areas, as appropriate;
 - g) The re-establishment of fish population, as appropriate;
 - h) The restoration of water flow characteristics compatible with fish habitat areas;
 - i) Demonstration that the flow and velocity of the stream after relocation or modification shall not be increased or decreased at the points where the stream enters and leaves the subject property, unless the change has been approved by the Planning Official to improve fish and wildlife habitat or to improve storm water management; and
 - j) A written description of how the proposed relocation or modification of the stream will significantly improve water quality, conveyance, fish and wildlife habitat, wetland recharge (if hydrologically connected to a wetland), and storm water detention capabilities of the stream.

Prior to diverting water into a new stream channel, a qualified professional approved by the Planning Official shall inspect the completed new channel and issue a written report to the Planning Official stating that the new stream channel complies with the requirements of this Section. The cost for this inspection and report shall be borne by the applicant.

H. **Bulkheads.** Bulkheads are not permitted along a stream except as provided in this Section. A proposal for a bulkhead shall be reviewed and decided upon by the Planning Official. Decisions made under this Subsection may be appealed in accordance with Section XVI of this Chapter. The Planning Official shall allow a bulkhead to be constructed only if:

1. It is not located within a wetland or between a wetland and a stream;
2. It is needed to prevent significant erosion;
3. The use of vegetation and/or other biological materials would not sufficiently stabilize the streambank to prevent significant erosion;
4. The applicant submits a plan prepared by a qualified professional approved by the Planning Official that shows a bulkhead and implementation techniques that meet the following criteria:
 - a) There will be no adverse impact to water quality;
 - b) There will be no adverse impact to fish and wildlife habitat;
 - c) There will be no increase in the velocity of stream flow, unless approved by the Planning Official to improve fish habitat;
 - d) There will be no decrease in flood storage volumes;
 - e) Neither the installation, existence, nor operation of the bulkhead will lead to unstable earth conditions or create erosion hazards; and
 - f) Neither the installation, existence, nor operation of the bulkhead will be detrimental to any other property or the City as a whole.

The bulkhead shall be designed and constructed to minimize the transmittal of water current and energy to other properties. Changes in the horizontal or vertical configuration of the land shall be kept to a minimum. Fill material used in construction of a bulkhead shall be non-dissolving and non-decomposing. The applicant shall also stabilize all exposed soils by planting native riparian vegetation with high food and cover value for fish and wildlife.

I. **Culverts.** Culverts are not permitted in streams except as specified in this Section. The Planning Official shall review and decide upon an application to place a stream in a culvert under an access drive, driveway, or street. Decisions made under this Subsection may be appealed in accordance with Section XVI of this Chapter. The Planning Director will review and decide upon proposals to place streams in culverts, other than as specified above, using Process J, described in Chapter 145 of the Kirkland Zoning Code. A stream shall be allowed to be put in a culvert only if:

1. No significant habitat area will be destroyed;

2. Placing the stream in a culvert is necessary to make reasonable use of the subject property (see Section XII). Convenience to the applicant in order to facilitate general site design shall not be considered;
3. The applicant submits a plan prepared by a qualified professional approved by the Planning Official that shows the culvert and implementation techniques that meet the following criteria:
 - a) There will be no adverse impact to water quality;
 - b) There will be no adverse impact to fish and wildlife habitat;
 - c) There will be no increase in the velocity of stream flow, unless approved by the Planning Official to improve fish habitat;
 - d) There will be no decrease in flood storage volumes;
 - e) Neither the installation, existence, nor operation of the culvert will lead to unstable earth conditions or create erosion hazards; and
 - f) Neither the installation, existence, nor operation of the culvert will be detrimental to any other property or to the City as a whole.

The culvert shall be designed and constructed to allow passage of fish inhabiting the stream or which may inhabit the stream in the future. The culvert shall be large enough to accommodate a 100-year storm event. The applicant shall at all times keep the culvert free of debris and sediment so as to allow free passage of water and fish. The Planning Official shall require a security or perpetual culvert maintenance agreement under Section XIII of this Chapter for continued maintenance of the culvert.

If a proposal for a culvert is denied, a bridge may be approved if the bridge complies with the above criteria.

If a proposed project requires approval through Process IIB or Process III, the City Council may require that any stream in a culvert on the subject property be opened, relocated, and restored, consistent with the provisions of this Subsection.

- J. Rehabilitation. The Planning Official may permit or require the applicant to restore and maintain a stream and/or its buffer by removing material detrimental to the stream and its surrounding area such as debris, sediment, or vegetation. The Planning Official may also permit or require the applicant to restore a stream or its buffer through the addition of native plants and other habitat features. Restoration may be required at any time that a condition detrimental to water quality or habitat exists.

IX. FREQUENTLY FLOODED AREAS

No land surface modification may take place and no improvements may be located in a frequently flooded area except as specifically provided for in Chapter 21.56 of the Kirkland Municipal Code.

X. SITE REQUIREMENTS AND SENSITIVE AREAS PROTECTION TECHNIQUES

In addition to any other requirement of this Chapter, the applicant shall locate all improvements on the subject property to minimize adverse impacts to sensitive areas.

The applicant shall install a berm, curb, or other physical barrier during construction and following completion of the project when necessary to prevent direct runoff and erosion from any modified land surface into any sensitive area.

The applicant shall locate parking and vehicle circulation areas as far as possible from sensitive areas.

The decision maker may limit development activity in or near sensitive areas to specific months and to a maximum number of continuous days or hours in order to minimize adverse impacts.

The decision maker may require that equipment be operated from only one side of a stream in order to minimize bank disruption.

The decision maker may require other construction techniques, conditions, and restrictions in order to minimize adverse impacts to sensitive areas or to other areas not subject to development activity.

XI. MAXIMUM DEVELOPMENT POTENTIAL

- A. Dwelling Units. The theoretical maximum number of dwelling units for a site which contains a wetland, stream, minor lake, or their buffers shall be the Buildable Area in square feet divided by the minimum lot area per unit as specified by Kirkland Zoning Code Chapters 15 through 65, plus the area of the wetland, stream, minor lake, and buffer in square feet divided by the minimum lot area per unit as specified by Kirkland Zoning Code Chapters 15 through 65, multiplied by the Development Factor derived from Section XI.C:

MAXIMUM DWELLING UNIT POTENTIAL = (BUILDABLE AREA/THE PRESCRIBED MINIMUM LOT AREA PER UNIT) + [(SENSITIVE AREA AND BUFFER AREA/THE PRESCRIBED MINIMUM LOT AREA PER UNIT) X (DEVELOPMENT FACTOR)]

For purposes of this subsection only, "Buildable Area" means the total area of the subject property minus sensitive areas and their buffers.

Lot size and/or density may be limited by or through other provisions of this Code or other applicable law, and the application of the provisions of this Chapter may result in the necessity for larger lot sizes or lower density due to inadequate buildable area.

- B. **Development Factor.** The development factor, consisting of a "percent credit", to be used in computing the number of dwelling units per square feet or the maximum allowable commercial floor area for a site which contains a wetland, stream, minor lake, or buffer is derived from the following table:

Percentage of Site in Wetland, Stream, Minor Lake, and Buffer				Counted at
< 1	to	10%		30%
> 10	to	20%		27%
> 20	to	30%		24%
> 30	to	40%		21%
> 40	to	50%		18%
> 50	to	60%		15%
> 60	to	70%		12%
> 70	to	80%		9%
> 80	to	90%		6%
> 90	to	100%		0%

XII. REASONABLE USE

This Chapter is not intended, and shall not be construed or applied in a manner, to deny all economically viable use of private property. Using Process IIB, described in Chapter 152 of the Kirkland Zoning Code, if an applicant demonstrates to the satisfaction of the decision maker that application of this Chapter will deny all economically viable use of the property in a residential area, one single family home may be permitted subject to appropriate conditions if the applicant also demonstrates all of the following to the satisfaction of the decision maker:

- A. No use with less impact on the wetland or stream and the buffer is feasible and reasonable; and

- B. There is no feasible and reasonable on-site alternative to the proposed activities, considering possible changes in site layout, reductions in density and similar factors; and
- C. The proposed activities, as conditioned, will result in minimum feasible alteration or impairment to the wetland's or stream's functional characteristics and its existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and
- D. The proposed activities will not cause significant degradation of groundwater or surface-water quality; and
- E. All reasonable mitigation measures have been implemented or assured; and
- F. The proposed activities will not cause or result in damage to other properties; and
- G. The inability to derive economically viable use is not the result of the applicant's actions, including such actions as segregating or dividing the property and creating the undevelopable condition, or taking actions in violation of any local, state, or federal law or regulation. The purchase price paid for the property shall not be the measure of economically viable use.

The applicant shall either fund a report prepared by the City's wetland consultant or submit a report prepared by a qualified professional, and fund a review of this report by the City's wetland/stream consultant. The report shall describe how the proposal will or will not comply with the applicable decisional criteria.

If the decision maker determines that alteration of a wetland, stream, and/or buffer is necessary and unavoidable, the decision maker shall set forth in writing its findings with respect to each of the items listed in this subsection.

For the purpose of this section only, "residential area" means all portions of the City located in a zone in which "detached dwelling units" or "detached, attached or stacked dwelling units" are uses that are permitted or are approved pursuant to this Code.

XIII. BOND OR PERFORMANCE SECURITY

The Planning Official shall require a performance or maintenance bond, a performance or maintenance security, a perpetual culvert maintenance agreement, and/or a perpetual landscape maintenance agreement, as determined to be appropriate by the Planning Official, to ensure compliance with any aspect of this Chapter or any decision or determination made pursuant to this Chapter.

- A. Performance or Maintenance Bond or Security Requirement. The performance or maintenance security required by the Planning Official shall be provided in such forms and amounts as the Planning Official deems necessary to assure that all work or actions are satisfactorily completed or maintained in accordance with the approved plans, specifications, permit or approval requirements, and applicable regulations, and to assure that all work or actions not satisfactorily completed or maintained will be corrected to comply with approved plans, specifications, requirements, and regulations to restore environmental damage or degradation, protect fish and wildlife habitat and protect the health, safety, and general welfare of the public.
- B. Form of Performance Security. The performance security shall be a surety bond obtained from companies registered as surety in the state or certified as acceptable sureties on federal bonds. In lieu of a surety bond, the Planning Official may allow alternative performance security in the form of an assignment of funds or account, an escrow agreement, an irrevocable letter of credit, or other financial security device in an amount equal to that required for a surety bond. The surety bond or other performance security shall be conditioned on the work being completed or maintained in accordance with requirements, approvals, or permits; on the site being left or maintained in a safe condition; and on the site and adjacent or surrounding areas being restored in the event of damages or other environmental degradation from development or maintenance activities conducted pursuant to the permit or approval.
- C. Amount of Performance Security. The amount of the performance or maintenance security shall be 125 percent of the estimated cost, as approved by the Planning Official, of conformance to plans, specifications, and permit or approval requirements, under this Chapter, including corrective work and compensation, enhancement, mitigation, maintenance, and restoration of sensitive areas. All bond or performance security shall be submitted in their original form with original signatures of authorization.
- D. Administration of Performance Security. If during the term of the performance or maintenance security, the Planning Official determines that conditions exist which do not conform with plans, specifications, approval or permit requirements, the Planning Official may issue a stop work order prohibiting any additional work or maintenance until the condition is corrected. The Planning Official may revoke the performance or maintenance security, or a portion thereof, in order to correct conditions that are not in conformance with plans, specifications, approval or permit requirements. The performance or maintenance security may be released upon written notification by the Planning Official, following final site inspection or completion, as appropriate, or

when the Planning Official is satisfied that the work or activity complies with permits or approved requirements.

- E. Exemptions for Public Agencies. State agencies and local government bodies, including school districts, shall not be required to secure the performance or maintenance of permit or approval conditions with a surety bond or other financial security device. These public agencies are required to comply with all requirements, terms, and conditions of the permit or approval, and the Planning Official may enforce compliance by withholding certificates of occupancy or occupancy approval, by administrative enforcement action, or by any other legal means.

XIV. DEDICATION

Consistent with law, the applicant shall dedicate development rights, air space, or a greenbelt protection or open space easement to the City to ensure the protection of sensitive areas and their buffers.

XV. LIABILITY

Prior to issuance of a building permit, the applicant shall enter into an agreement with the City that runs with the property, in a form acceptable to the City Attorney, indemnifying the City from any claims, actions, liability and damages to sensitive areas arising out of development activity on the subject property. The applicant shall record this agreement with the King County Department of Elections and Records.

XVI. APPEALS

All classifications, decisions, and determinations made pursuant to this Chapter may be appealed using, except as stated below, the applicable appeal provisions of Chapter 145 of the Kirkland Zoning Code. The applicant or any other aggrieved person shall file the appeal within 15 days of the date of the decision maker's written classification, determination, or decision. If a proposed development activity requires approval through Process IIA, IIB, or III (as described in Chapters 150, 152, and 155, respectively, of the Kirkland Zoning Code), any appeal of a classification, determination, or decision will be heard as part of that other process.

XVII. SETBACKS AND BUFFERS REQUIRED BY PRIOR APPROVALS

If, subsequent to October 2, 1982, the City approved a subdivision, short subdivision, or development permit for the subject property with established setbacks or buffers on the subject property from a stream or wetland, those setbacks or buffers shall apply to any

development on the subject property pursuant to that subdivision, short subdivision, or development permit, or any redevelopment or remodeling pursuant to that subdivision, short subdivision, or development permit. Any inconsistent environmentally sensitive area buffer requirements of this Chapter shall not apply, provided that all of the provisions of this Chapter which do not directly conflict with the previously imposed setback or buffer requirements shall fully apply to the subject property.

Section 2. Duration. This Ordinance shall be effective for six months. This Ordinance may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.

Section 3. Severability. Should any section, paragraph, sentence, clause, phrase, or word of this Chapter be declared invalid or unconstitutional by a court or agency of competent jurisdiction, such invalidity or unconstitutionality shall not affect any of the remaining sections, paragraphs, sentences, clauses, phrases, or words of this Chapter, all of which will remain in full force and effect.

Section 4. Effective Date. This ordinance shall be in effect five days from and after its passage by the Kirkland City Council and publication, pursuant to Section 1.088.017 Kirkland Municipal Code, in the summary form attached to the original of this ordinance, and by this reference approved by the City Council, as required by law.

PASSED by majority vote of the Kirkland City Council in regular, open meeting this 20th day of October, 1998.

SIGNED IN AUTHENTICATION thereof this 20th day of October, 1998.



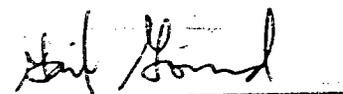
Mayor

Attest:



City Clerk

Approved as to Form:



City Attorney
ISAOFINA

ORDINANCE NO. 3706

AN ORDINANCE OF THE CITY OF KIRKLAND, RELATING TO SENSITIVE AREAS, EXTENDING TO MARCH 31, 2000 INTERIM REGULATIONS FOR SENSITIVE AREAS AS ADOPTED BY ORDINANCE NO. 3658; AND AMENDING SECTION 2 OF ORDINANCE NOS. 3658 AND 3684.

WHEREAS, the City Council has the authority to adopt interim regulations pursuant to RCW 35A.63.220 and 36.70A.390; and

WHEREAS, by Ordinance No. 3658, passed on October 20, 1998, the City Council adopted interim regulations that protect the particular functions and values of each drainage basin (sensitive areas); and

WHEREAS, by Ordinance No. 3684, passed on April 6, 1999, the City Council renewed Ordinance No. 3658 until September 30, 1999; and

WHEREAS, on September 7, 1999, the City Council held a public hearing on renewal of Ordinance No. 3658 until March 31, 2000; and

WHEREAS, the City Council desires to renew Ordinance No. 3658 until March 31, 2000; now, therefore

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

Section 1. Findings of Fact. The City Council finds that renewal or extension of Ordinance No. 3658 until March 31, 2000 is necessary in order to verify the effectiveness of the requirements of Ordinance No. 3658 and to complete permanent policies and regulations for sensitive areas.

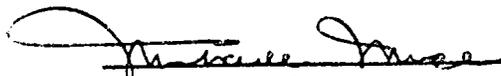
Section 2. Amendment. Section 2 of Ordinance No. 3658, as amended by Section 2 of Ordinance No. 3684, is further amended as follows:

This ordinance shall be effective until March 31, 2000. This ordinance may be renewed if a subsequent public hearing is held and findings of fact are made prior to each renewal.

Section 3. Effective Date. This ordinance shall be in effect five days from and after its passage by the Kirkland City Council and publication, pursuant to Section 1.088.017 Kirkland Municipal Code, in the summary form attached to the original of this ordinance, and by this reference approved by the City Council, as required by law.

PASSED by majority vote of the Kirkland City Council in regular, open meeting this 7th day of September, 1999.

SIGNED IN AUTHENTICATION thereof this 7th day of September 1999.


Mayor

Attest:


Deputy City Clerk

Approved as to Form:


City Attorney

ISAGEXTORD

ORDINANCE NO. 3742

AN ORDINANCE OF THE CITY OF KIRKLAND, RELATING TO SENSITIVE AREAS, EXTENDING TO SEPTEMBER 30, 2000 INTERIM REGULATIONS FOR SENSITIVE AREAS AS ADOPTED BY ORDINANCE NO. 3658; AND AMENDING SECTION 2 OF ORDINANCE NO. 3706.

WHEREAS, the City Council has the authority to adopt interim regulations pursuant to RCW 35A.63.220 and 36.70A.390; and

WHEREAS, by Ordinance No. 3658, passed on October 20, 1998, the City Council adopted interim regulations that protect the particular functions and values of each drainage basin (sensitive areas); and

WHEREAS, by Ordinance No. 3684, passed on April 6, 1999, the City Council renewed Ordinance No. 3658 until September 30, 1999; and

WHEREAS, by Ordinance No. 3706, passed on September 7, 1999, the City Council renewed Ordinance No. 3658 until March 31, 2000; and

WHEREAS, on March 21, 2000, the City Council held a public hearing on renewal of Ordinance No. 3658 until September 30, 2000; and

WHEREAS, the City Council desires to renew Ordinance No. 3658 until September 30, 2000; now, therefore

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

Section 1. Findings of Fact. The City Council finds that renewal or extension of Ordinance No. 3658 until September 30, 2000 is necessary in order to verify the effectiveness of the requirements of Ordinance No. 3658 and to complete permanent regulations for sensitive areas.

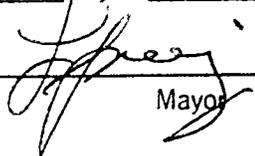
Section 2. Amendment. Section 2 of Ordinance No. 3658, as last amended by Section 2 of Ordinance No. 3706, is further amended as follows:

This ordinance shall be effective until September 30, 2000. This ordinance may be renewed if a subsequent public hearing is held and findings of fact are made prior to each renewal.

Section 3. Effective Date. This ordinance shall be in effect five days from and after its passage by the Kirkland City Council and publication, pursuant to Section 1.088.017 Kirkland Municipal Code, in the summary form attached to the original of this ordinance, and by this reference approved by the City Council, as required by law.

PASSED by majority vote of the Kirkland City Council in regular, open meeting this 21st day of March, 2000.

SIGNED IN AUTHENTICATION thereof this 21st day of March, 2000.



Mayor

Attest:



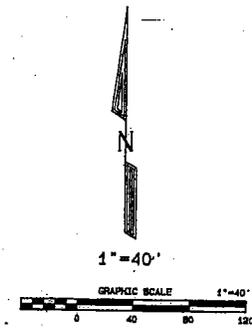
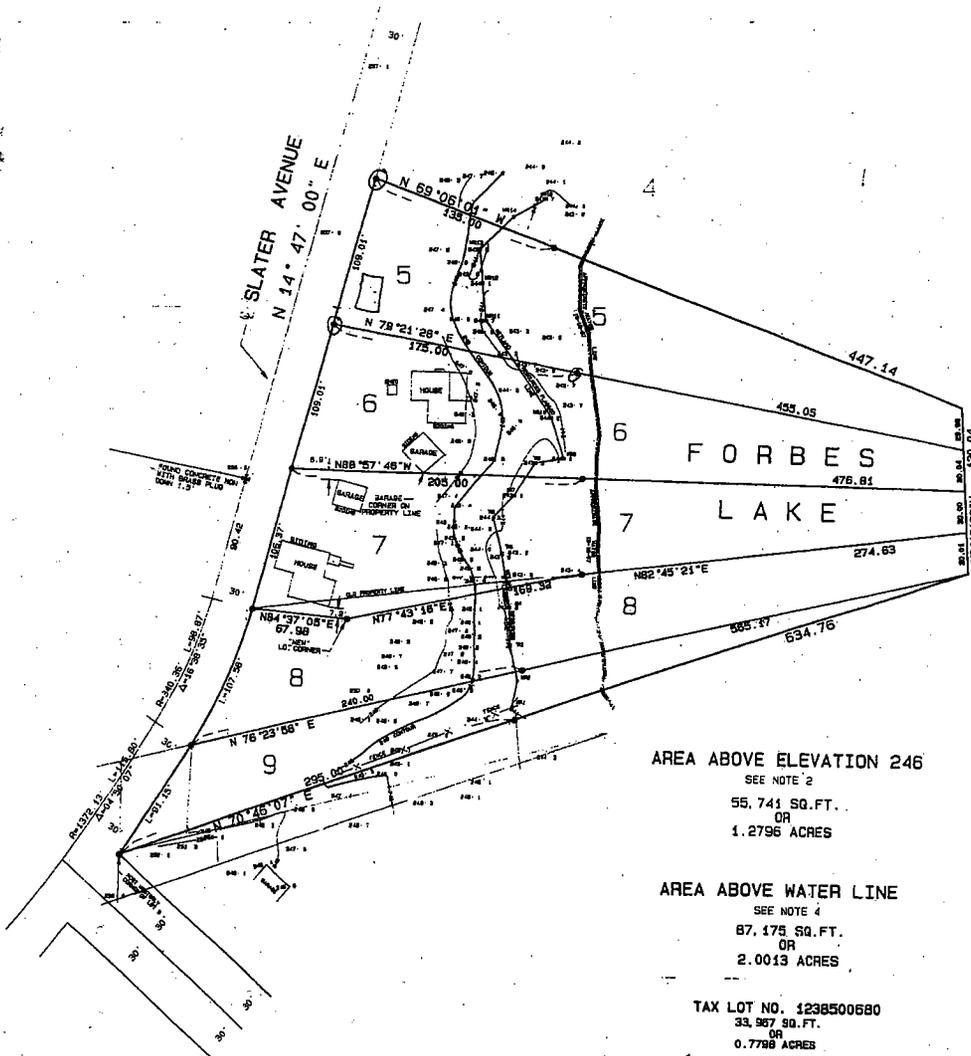
City Clerk

Approved as to Form:



City Attorney

SAGECORS



LEGEND
 ● - SET 1/2" REBAR WITH CAP UNLESS NOTED

LEGAL DESCRIPTION
 ENTIRE PROPERTY

LOTS 5, 6, 7 AND 8, BLOCK 43, BURKE & FABRIS KIRKLAND ADDITION TO THE CITY OF SEATTLE, DIVISION NO. 14, "AS PER PLAN" RECORDED IN VOLUME 20 OF PLATS, RECORDS OF KING COUNTY, WASHINGTON TOGETHER WITH THAT PORTION OF LOT 9, OF SAID BLOCK 43, DESCRIBED AS FOLLOWS:
 BEGINNING AT THE MOST WESTERLY CORNER OF SAID LOT 9, AND RUNNING THENCE NORTH 88°41'47" EAST ALONG THE NORTHWESTERN CORNER OF SAID LOT 9 AND THE SOUTHEASTERN MARGIN OF SLATER AVENUE NORTHEAST 51.15 FEET TO THE NORTHWEST CORNER OF SAID LOT 9, WHICH IS ALSO THE MOST SOUTHERLY CORNER OF SAID LOT 8; THENCE NORTH 78°29'38" EAST ALONG THE MOST SOUTHERLY CORNER SAID LOTS 8 AND 9, A DISTANCE OF 203.17 FEET TO THE DIVIDING LINE BETWEEN LOT 8; THENCE WESTERLY AL A STRAIGHT LINE TO THE POINT OF BEGINNING.
 ALL SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON.

NOTES

- EASMENTS, IF EXISTING, ARE NOT SHOWN ON THIS SURVEY.
- THE CITY OF KIRKLAND POSSESSES A REPORT ENTITLED "FORBES LAKE DRAINAGE BASIN ANALYSIS FOR LAKE KIRKLAND PARK" A CONDOMINIUM PROJECT LOCATED ON THE NORTHEAST SIDE OF FORBES LAKE. THE REPORT WAS PREPARED BY HARMSEN & ASSOCIATES, A CIVIL ENGINEERING AND LAND SURVEYING FIRM ON OCTOBER 28, 1991. THE REPORT LIST THE 100 YEAR STORM ELEVATION FOR FULLY DEVELOPED CONDITIONS ALONG FORBES LAKE TO BE ELEVATION 245.05. HARSTAD CONSULTANTS HAS CONDUCTED A PARTIAL TOPOGRAPHY SURVEY OF THE SUBJECT PROPERTY USING THE BENCH MARKS USED BY HARMSEN & ASSOCIATES TO CONDUCT THE DRAINAGE ANALYSIS. THE 245 CONTOUR WAS USED AS THE 100 YEAR STORM ELEVATION FOR FULLY DEVELOPED CONDITIONS TO COMPUTE THE AREA OF THE SUBJECT PROPERTY ABOVE THE 100 YEAR FULLY DEVELOPED STORM ELEVATION. THE AREA WAS COMPUTED TO BE 55,741 SQ.FT. OR 1.2798 ACRES.
- THE LEGAL DESCRIPTION IS SHOWN AS SUPPLIED BY THE CLIENT WITH SOME MINOR CORRECTIONS. BOUNDARY CALCULATIONS ARE BASED ON THE ABOVE SHOWN LEGAL DESCRIPTION.
- THE EDGE OF WATER OF FORBES LAKE WAS LOCATED BY HARSTAD CONSULTANTS ON OCTOBER 16, 1997.

AREA ABOVE ELEVATION 246
 SEE NOTE 2

55,741 SQ.FT.
 OR
 1.2798 ACRES

AREA ABOVE WATER LINE
 SEE NOTE 4

87,175 SQ.FT.
 OR
 2.0013 ACRES

TAX LOT NO. 1238500680
 33,967 SQ.FT.
 OR
 0.7788 ACRES

TAX LOT NO. 1238500690
 53,208 SQ.FT.
 OR
 1.2215 ACRES

2.6.97
Keith R. Harstad
 8-19-97

REV. NO.	DRAWN BY	REVISIONS	DATE	APPROVAL
1	JRH	LOCATED STRUCTURES & REVISED LOTS 7 & 8	8-19-97	JR HARSTAD
2	JRH	ADDED AREAS OF TAX LOTS AND 1238500680 & 1238500690	10-27-97	JR HARSTAD
3	JRH	ADDED FORBES LAKE EDGE OF WATER	10-27-97	JR HARSTAD

ENCLOSURE 5
 STAFF MEMO - 9/15/05

HARSTAD CONSULTANTS CIVIL ENGINEERS • LAND SURVEYORS <small>2024 • 418 Broadway • Ste. 150 • Seattle, WA 98102 • 206 • 467-8336</small>	KEITH GOSNEY	DRAWN BY: JRH CHECKED BY: JRH INCHES: 1/8" = 1'
	HOUSE LOCATION FOR PROPOSED LOT LINE ADJUSTMENT	

January 21, 2004

Keith & Kimiko Gosney
10024 Rainier Avenue S.
Seattle, WA. 98178



RE: **SLATER AVENUE NE SANITARY SEWER LATECOMER'S ASSESSMENT**

Dear Mr. & Mrs. Gosney:

As you may be aware, a new senior housing development has occurred in your neighborhood at 9224 Slater Avenue NE. The development extended a sanitary sewer main along Slater Avenue NE at the developer's expense. Your property would receive a direct benefit from this extension should you connect to the sanitary sewer system or develop your property. The developer has opted to file a sewer reimbursement agreement with the City to recoup some of the expense of the extension.

Pursuant to RCW 65.08.170-180, notice is given that the City of Kirkland has established a sewer assessment of \$9,848.01 per stub or stub equivalent of direct benefit for the connection of the premises located at Slater Avenue NE, Tax Parcel No. 123850-0685, to the public sewer line located at Slater Avenue NE, subject further to all lawful limitations. Said charge is in addition to and not in lieu of any other applicable fees or assessments.

The direct benefit and assessment for your property is:

	Stub per land use (1/10 units)	Rate Per Stub or Stub Equivalency	Assessed Rate
Direct Benefit	1	\$9,848.01	\$9,848.01

This assessment is in the process of being recorded against the property referenced above and will become due at the time the property is connected to sewer within the next fifteen (15) years.

If you have any questions concerning this latecomer assessment or any other City of Kirkland utility assessment, please do not hesitate to contact me at 425.828.1296.

Sincerely,
Public Works Department

A handwritten signature in cursive script that reads "Gregory A. Neumann".

Greg Neumann
Development Engineer

Cc: Address File
Latecomer's File

ENCLOSURE <u>6</u>
STAFF MEMO - 9/15/05



JOHNS MONROE MITSUNAGA
P L L C

Robert D. Johns Michael P. Monroe Darrell S. Mitsunaga Duana T. Koloušková

RECEIVED

SEP 29 2005

AM PM
PLANNING DEPARTMENT

City of Kirkland Hearing Examiner **BY**
123 Fifth Avenue
Kirkland, WA 98033

September 29, 2005

Re: Rosinski Reasonable Use Permit (ZON05-00016)
Hearing Date: September 1, 2005; 7:00 p.m

Dear Mr. Hearing Examiner:

This letter and the attached declarations and exhibits constitute Mr. Rosinski's rebuttal with respect to his reasonable use application.

At issue are the two additional criteria for the Hearing Examiner's consideration found in KZC 90.140. As argued previously and conceded by staff, these two criteria are for the Hearing Examiner's consideration, but are not to be determinative of the application.

The purpose of the two additional criteria appears to be to discourage or preclude individuals from subdividing property into unbuildable lots and then using a reasonable use exception to get around development regulations which would otherwise preclude development. The two additional criteria allow the Hearing Examiner to look a little more closely to see if need for the reasonable use exception is due to an applicant's actions. In this case, Mr. Rosinski has neither created nor contributed to the need for a reasonable use exception for Lot 5. To the contrary, Mr. Rosinski has applied to construct a modest single-family home, smaller than many in the area, and at the same time, enhance and improve the wetland buffer. All in all, the result will be to have a better wetland buffer and healthier wetland while allowing Mr. Rosinski to make minimum economic use of Lot 5 consistent with Kirkland's zoning and long range plan for the site.

Lot 5 was created in 1911. At that time, a significant amount of land was subdivided in what is now the City of Kirkland. The lots created at that time period are legal lots in the same manner as if they were created more recently. Many, if not most, of these long-standing lots have been developed or even subdivided again. Lot 5 is no different.

EXHIBIT F

HE REC. ZON05.00016

Since the creation of Lot 5, to the best of the applicant's knowledge, there has been no alteration to the lot lines or boundaries. *Declaration of Charles Rosinski*, attached. As a result, the lot has remained the same for almost 100 years. In that interim time period, many if not most of the other lots also created in the same subdivision have been developed, some with homes located closer to the wetland at issue and well within what is now the wetland buffer.

Again, as noted above, the purpose of the additional reasonable use criteria is to avoid rewarding a property owner who might otherwise attempt to evade sensitive area regulations by intentionally creating lots that necessitate a reasonable use exception to be developed. Such is certainly not the case here. Mr. Rosinski purchased the property with no knowledge that a reasonable use exception would be necessary to develop the property. *Declaration of Rosinski*. To the contrary, a review of the area maps reveals that Mr. Rosinski was reasonable in expecting to develop the property with a single-family home in the same manner as the surrounding properties.

Staff has erroneously asserted that the Real Estate Excise Tax Affidavit language reveals some knowledge on behalf of Mr. Rosinski of the need for a reasonable use approval. As Mr. Rosinski has explained, the additional language on the Affidavit provides that the purchase price was set at such a low amount because the property was unbuildable at the time of the purchase and sale agreement, i.e. year 2000. As of 2000, sewer had not been extended down Slater Avenue and, as a result, the property was not served by sewer. Therefore, the property was, in fact, unbuildable. The parties reflected this fact in both the purchase price and the Affidavit. *Declaration of Rosinski; Declaration of Keith Gosney*. The language on the Affidavit did not have anything to do with the application of the City's development regulations to the property, sensitive area regulations or other. *Id.*

A denial of this reasonable use application will deny Mr. Rosinski of all economically viable use of Lot 5. *Declaration of Rosinski*. Without a reasonable use approval, Mr. Rosinski cannot develop any single-family residence on the property. *Id.* No other reasonable development alternative exists under the current zoning; to the contrary, the current zoning anticipates that this property will be developed with a single-family residence just as Mr. Rosinski has proposed. Simply, there is no development alternative available: this proposal has the least impact to the site.

In fact, the mitigation for the buffer that will be provided if the reasonable use application is approved will serve to enhance and improve the wetland buffer and, consequently, the wetland itself. With the reasonable use approval, the wetland buffer will be re-vegetated

from blackberries to native, wetland species and be maintained for a substantial period of time to ensure that the native vegetation takes permanent hold.

It is also relevant to return to Staff's original staff report. Staff agrees that Mr. Rosinski has satisfied the three necessary criteria for the reasonable use exception. In its report, staff concluded the following:

- (1) The proposed single family use is the least intensive use that is allowed for the subject property. There is no other permitted type of land use for the property that would have a lesser impact on the wetland and associated buffer.
- (2) Within the amount of wetland and buffer area on the subject property, the proposed location of the single family residence is feasible and reasonable.
- (3) The proposal, as conditioned with the incorporation of the recommendations made by The Watershed Company, would result in minimum feasible alteration of or impairment to the functional characteristics of the sensitive areas, and their existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and will not cause significant degradation of groundwater or surface-water quality.

Staff's sole reason for recommending denial was staff's misunderstanding of the language on the Real Estate Excise Tax Affidavit related to property having been unbuildable in year 2000. Had staff approached the applicant prior to issuing its staff report to inquire as to that language, the applicant would have easily been able to address staff's concern at the outset by providing additional information. Even so, the applicant has provided all information and evidence necessary to explain the Affidavit language and has provided ample information and evidence supporting the reasonable use exception.

Based on the foregoing, the attachments, and all evidence in the record before the Hearing Examiner, Mr. Rosinski respectfully requests this Hearing Examiner to recommend approval of the reasonable use exception.

Sincerely,



Duana T. Koloušková

Direct Tel: (425) 467-9966

Email: kolouskova@jmmlaw.com

Hearing Examiner McConnell
September 29, 2005
Page 4

Enclosures

cc: Jeremy McMahan, Planning Supervisor
Robin Jenkinson, City Attorney
Tony Leavitt, Planner
Client

1820-1 rebuttal 9-29-05

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**CITY OF KIRKLAND
HEARING EXAMINER**

In Re the Application of Rosinski for
Reasonable Use

NO. ZON05-00016

DECLARATION OF KEITH GOSNEY

I, Keith Gosney, hereby declare as follows.

1. I owned the property commonly known as Lot 5 on Slater Avenue, Kirkland, Washington. I sold this property to Mr. Rosinski, who I understand has applied for a reasonable use permit.

2. When I signed the Real Estate Excise Tax Affidavit, I also signed the paragraph including the statement that "at the time of our purchase and sale agreement the property was unbuildable." This statement referred to the purchase and sale agreement made in 2000 for \$30,000, and then modified in 2001 to reflect the \$22,000 purchase price. As of 2000, the property was unbuildable because there was no sewer service to the property, or even to Slater Avenue. As a result, the purchase price was drastically lower than it would otherwise have been. Because of the low purchase price, we agreed it was necessary to include a statement on the subsequent Real Estate Excise Tax Affidavit acknowledging that such price was accurate and the original reason therefore.

DECLARATION OF KEITH GOSNEY
PAGE 1 of 2

JOHNS MONROE MITSUNAGA PLLC
ATTORNEYS AT LAW
1500 114th Ave. SE, Suite 102
Bellevue, Washington 98004
Tel: (425) 451 2812 / Fax (425) 451 2818

COPY

1 3. The statement contained in the Real Estate Excise Tax Affidavit was not, and was not
2 intended to be, an assertion of whether Kirkland City Code would permit or preclude any
3 development on the property as a result of wetland or other regulations. Instead, the statement
4 was strictly related to our original agreement on purchase price due to the unavailability of
5 sewer at that time.

6 I declare under penalty of perjury under the Laws of the State of Washington that the
7 foregoing is true and correct.

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9 DATED this ____ day of _____, 2005, in
10 _____, Arizona.

11 _____
12 Keith Gosney

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24 *1820-1 Decl of Gosney 9-27-05*

25 *DECLARATION OF KEITH GOSNEY*

PAGE 2 of 2

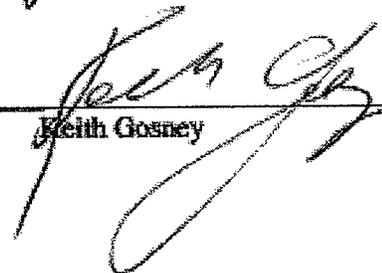
JOHNS MONROE MITSUNAGA PLLC
ATTORNEYS AT LAW
1500 114th Ave. SE, Suite 102
Bellevue, Washington 98004
Tel: (425) 451 2812 / Fax (425) 451 2818

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3. The statement contained in the Real Estate Excise Tax Affidavit was not, and was not intended to be, an assertion of whether Kirkland City Code would permit or preclude any development on the property as a result of wetland or other regulations. Instead, the statement was strictly related to our original agreement on purchase price due to the unavailability of sewer at that time.

I declare under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

DATED this 27 day of Sept., 2005, in
Mesa, Arizona.



Keith Gosney

1820-1 Decl of Gosney 9-27-05

DECLARATION OF KEITH GOSNEY
PAGE 2 of 2

JOHNS MONROE MITSUNAGA PLLC
ATTORNEYS AT LAW
1500 114th Ave. SE, Suite 102
Bellevue, Washington 98004
Tel: (425) 451 2812 / Fax (425) 451 2818

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**CITY OF KIRKLAND
HEARING EXAMINER**

In Re the Application of Rosinski for
Reasonable Use

NO. ZON05-00016

**DECLARATION OF CHARLES
ROSINSKI**

I, Charles Rosinski, hereby declare as follows.

1. I own the property commonly known as Lot 5 on Slater Avenue, Kirkland, Washington. I am the applicant for a reasonable use approval to allow a modest-size single family home to be built on the property.
2. The lot was created in 1911. To the best of my knowledge the lot lines have not changed through any boundary line adjustment or any other process.
3. I and my now ex-wife purchased the property in 2000 from Keith and Kim Gosney. We originally agreed on a purchase price of \$30,000. We agreed on this low purchase price because sewer had not been extended the length of Slater Avenue at that time to serve Lot 5 and the surrounding properties. In 2001, we altered the purchase price to \$22,000 because we conveyed a parcel in Gold Bar to the Gosneys in partial satisfaction of our debt on Lot 5.

DECLARATION OF CHARLES ROSINSKI

PAGE 1 of 3

COPY

JOHNS MONROE MITSUNAGA PLLC
ATTORNEYS AT LAW
1500 114th Ave. SE, Suite 102
Bellevue, Washington 98004
Tel: (425) 451 2812 / Fax (425) 451 2818

1 4. We signed and recorded the Real Estate Excise Tax Affidavit in 2004, when I finally
2 paid off the remaining debt on the property. As part of that Affidavit, all signatories agreed it
3 would be appropriate to make a statement as to why the purchase price was so low, i.e. that the
4 property was unbuildable at the time of our sale agreement in 2000 because there was no
5 sewer service to the property or the general area.

6 5. At the time we made our sale agreement in 2000 and then modified the price in 2001, I
7 had no knowledge as to the extent of wetland buffers on the property. I was not aware at that
8 time that I would need a reasonable use approval in order to construct even a modest single
9 family residence on the property. In fact, I was not aware I would need a reasonable use
10 approval to build any single-family residence on the property until very late in the year of
11 2004.

12 6. I have no intention of developing the property as if no wetland or buffers existed on
13 site. To the contrary, it is my understanding that the mitigation that I have proposed, and
14 particularly coupled with the even higher requirements recommended by staff, will improve
15 the buffer and enhance the wetland. Therefore, it is my belief that this reasonable use permit
16 will result in mitigation that will ultimately improve the wetland.

17 7. In the event the City does not approve my reasonable use application, I will not be able
18 to make any economically viable use of the property. Because of the extent of the buffer on
19 Lot 5, I will not be able to construct any sort of single-family home. As a result, I will be
20 forced to hold the property in a vacant state for the indefinite and apparently permanent future.

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25 *DECLARATION OF CHARLES ROSINSKI*

PAGE 2 of 3

JOHNS MONROE MITSUNAGA PLLC
ATTORNEYS AT LAW
1500 114th Ave. SE, Suite 102
Bellevue, Washington 98004
Tel: (425) 451 2812 / Fax (425) 451 2818

1 I declare under penalty of perjury under the Laws of the State of Washington that the
2 foregoing is true and correct.

3
4 DATED this 28 day of Sept., 2005, in
5 Bellevue, Washington.

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7 Charles Rosinski

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19 1820-1 Decl of Rosinski 9-28-05



**HEARING EXAMINER
MEETING MINUTES – September 1, 2005**

CALL TO ORDER:

The September 1, 2005 meeting was convened by the Hearing Examiner, Ron McConnell, at 7:01 p.m. Tony Leavitt and Jeremy McMahan represented the Department of Planning and Community Development.

PUBLIC HEARING: Applicant: Charles Rosinski, Applicant for Reasonable Use Permit at the 9500 block of Slater Avenue NE, File No. ZONO4-00016.

Mr. Leavitt gave a PowerPoint presentation and reviewed the proposal in question and the process for review. He exhibited a map showing the site plan under review. The application is for approval of a reasonable use permit to allow construction of one single-family residence within a Type 1 wetland buffer, to impact approximately 3,600 square feet.

Mr. Leavitt summarized events leading to tonight's hearing and reviewed Chapter 90 of the wetlands regulations, Drainage Basin Regulations. He said the primary purpose of wetland regulations is to achieve a goal of no net loss of wetland function, among other purposes. He reviewed Goals NE-1 and NE-2 of the Comprehensive Plan which speak to protection and management of natural systems and environments. Mr. Leavitt said that Kirkland Zoning Code (KZC) 90.140 sets forth Determination Criteria and Consideration Criteria for the decision maker in these matters.

The following criterion denying reasonable use of the land was cited:

The land use and environment regulations which prevent reasonable use of the property were in effect at the time of purchase of the property by the applicant.

It was noted that the existing Chapter 90 regulations were adopted in April of 2002 and Mr. Rosinski purchased the property in July 2004 for \$22,000, according to King County records.

After review of the above criteria and facts of Mr. Rosinski's application, Staff concluded that:

- The applicant purchased the property after adoption of the current regulations.
- The applicant certified that the property was not suitable for building structures ("unbuildable") and the price he paid reflects this fact.
- Staff assumes that the conditions on the property have not changed and that the property is still unbuildable.

Staff Recommendation:

Based on the information presented, Staff concludes that the proposed reasonable use application should be denied based on the fact that the applicant knew the property was unbuildable when he purchased the property.

Staff also recognizes that, if the Hearing Examiner adopts different findings and conclusions recommending approval of this application, Staff would recommend adoption of the conditions set forth in Attachment "3" of Advisory Report dated August 25, 2005 be adopted.

Mr. McConnell marked the Advisory Report as Exhibit "A" and the PowerPoint presentation as Exhibit "B." Mr. Leavitt advised Mr. McConnell that no additional public comments have been received since Staff's August 25th report was sent out.

Mr. McConnell received a five-page letter with 27 pages of attachments from Mr. Rosinski's which Mr. McConnell marked Exhibit "C".

Applicant, Mr. Charles Rosinski, P.O. Box 5000-139, Duvall WA 98019, and 45520 SR 2, Gold Bar, spoke the history of the real estate purchase and his dealings with the City. Mr. Rosinski said that purchase of the subject property was part of a deal involving purchase of another property from Mr. Gosney in Gold Bar, in July 2000. He knew subject property was unbuildable due to no sewer being on the property but purchased it as a storage area for his panels as the property was centrally located for his purposes. In December 2002 Mr. Rosinski states he began talking with City staff and submitted an application for a buffer modification which eventually was rejected by the City. Mr. Rosinski feels that the essential criteria for reasonable use have been met. Additionally he feels that purchase of the property was made prior to April 2002.

Applicant's attorney Darrell Mitsunaga, 1500 114th Avenue SE, Bellevue, spoke. He submitted a letter dated September 1, 2005, entered as Exhibit "D". Mr. Mitsunaga reviewed provisions of KZC 90 and feels that there is no issue with the subject property relating to the Code. He said what Mr. Rosinski proposes will enhance the property with additional trees, maintenance, plants, soils, etc. He said the dispute has to do with provisions of the Code that speak to what should be considered in making a determination of reasonable use. The issues are:

- whether or not the ability to derive reasonable use is a result of the applicant's conduct, and
- whether or not these environmental land use regulations were in place at the time of purchase.

Mr. Mitsunaga feels that both of these issues must be considered together. Additionally, he feels that it is not mandated that the City or Hearing Examiner deny reasonable use, even if the applicant fails to meet these two criteria. He feels the City misunderstood the timing of the purchase of the subject property.

Mr. McConnell invited public comment.

1. **Maxine Keesling**, 15241 NE 153rd Street, Woodinville, owns lots 1, 2, and 3 in the subject area. She requests copies of all reports in this matter.

2. **Gwen Anderson**, 9252 Slater Avenue NE, Kirkland states she was surprised that Mr. Rosinski was unaware of the fact that wetland buffers existed as, when she purchased a lot in the area she was told clearly about the planting, pruning, and other restrictions on the property. She says the subject property is under water much of the year and she has offered to purchase the property from Mr. Rosinski to preserve its natural state. She opposes the Reasonable Use Permit application.
3. **Alison Showalter**, 9252 Slater Avenue NE, Kirkland was made well aware of restrictions to the property when she bought a nearby lot, that it is part of the wetlands. She states the property is under water four to five months of the year. She opposes the Reasonable Use Permit application.

Mr. Rosinski said that he has no plans to develop the wetland; what he proposes will be better for the lake. They are not in the high water area.

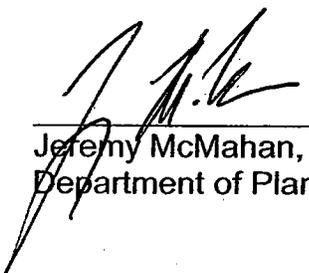
Mr. Leavitt clarified that the wetland buffer is measured from the wetland edge and has nothing to do with the floodplain. Wetland determinations are based on soil and water content, not the location of the floodplain.

Mr. McMahan requested of the Hearing Examiner that staff be given two weeks to look over the additional materials submitted this evening and submit a response by September 15th. The applicant was given an additional two weeks to submit a response to staff's comments. Mr. McConnell set September 29 as the response deadline for City and Applicant. The hearing will remain open until that date.

Mr. Leavitt stated that all parties of record will receive a copy of all information and correspondence.

ADJOURNMENT:

Hearing no further testimony, the Hearing Examiner declared the hearing closed at 7:50 p.m.



Jeremy McMahan, Planning Supervisor
Department of Planning and Community Development

Recording Secretary: Marlene Eisele, City of Kirkland



JOHNS MONROE MITSUNAGA
PLLC

/// Robert D. Johns /// Michael P. Monroe /// Darrell S. Mitsunaga /// Duana T. Koloušková ///

City Council Members
c/o Planning and Community Development
City of Kirkland
123 Fifth Avenue
Kirkland, WA 98033

October 28, 2005

Re: Rosinski Reasonable Use Permit
Kirkland File No. ZON05-00016
Hearing Date: December 13, 2005; 7:30 p.m

Challenge to Hearing Examiner's Recommendation

Dear Honorable Council Members:

This letter, together with the declarations and exhibits contained in the underlying record, constitute Mr. Rosinski's challenge to the Hearing Examiner's recommendation with respect to his reasonable use application. At issue is whether the City should grant a reasonable use approval for Lot 5, owned by Mr. Rosinski. The Hearing Examiner found that Mr. Rosinski's application complies with all the mandatory criteria in Kirkland Municipal Code. However, the Hearing Examiner has recommended denial solely because he does not believe the declarations made under oath related to what Mr. Rosinski's subjective knowledge was when title to the property was transferred in mid-2004.

This Challenge is made to the following Hearing Examiner findings and conclusions:

- B. Approval Criteria: 2. Reasonable Use Consideration Criteria: (b) (2)
- B. Approval Criteria: 2. Reasonable Use Consideration Criteria: (b) (3)
- B. Approval Criteria: 3. General Zoning Criteria: (b)

Background.

Lot 5 was created in 1911. At that time, a significant amount of land was subdivided in what is now the City of Kirkland. The lots created at that time period are legal lots in the same manner as if they were created more recently. Many, if not most, of these long-standing lots have been developed or even subdivided again. Lot 5 is no different.

Lot 5's property boundaries have remained the same since it was created. In that interim time period, many if not most of the other lots also created in the same subdivision have been developed, some with homes located closer to the wetland at issue and well within what is now the wetland buffer.

Mr. Rosinski entered into an agreement to purchase Lot 5 from Keith Gosney in year 2000. *Declaration of Charles Rosinski* (contained in Exhibit F¹). As of Mr. Rosinski purchase in 2000, there was no sewer service to the property, or to the area in general. *Declaration of Keith Gosney* (contained in Exhibit F). Extension of sewer service to the property in 2000 for simply Lot 5 would have been economically infeasible. Exhibit C, Rosinski Letter, dated September 1, 2005. However, without sewer, the property was unbuildable. As a result, in 2000 Mr. Rosinski and Mr. Gosney agreed upon a purchase price of \$30,000.00. Mr. Rosinski undertook the risk of addressing the sewer issue for Lot 5. The purchase price reflected the significant risk Mr. Rosinski took by purchasing property not served by public sewer.

The parties agreed that title would remain in Mr. Gosney's possession until the earlier of three circumstances: payment in full, receipt of building permit, or five years. Exhibit C, Attachment A.

In consideration of sale of Lot 5, Mr. Rosinski conveyed an unrelated parcel in Gold Bar to Mr. Gosney in 2001. *Declaration of Rosinski*. The parties agreed to reduce the purchase price to \$22,000 because of the in kind trade. Mr. Rosinski finished paying the purchase price in 2004, and at that time Mr. Gosney officially transferred title to the property to Mr. Rosinski. In late 2003, a sewer main was extended along Slater Avenue. However, as the parties had already agreed upon a purchase price in 2000 reflecting that the balance of risk related to when sewer would be extended was placed on Mr. Rosinski, Mr. Gosney did not attempt to rescind the agreed upon price. Without doubt, had Mr.

¹ Unless otherwise noted, all exhibits referenced use the lettering provided in the Hearing Examiner recommendation.

Gosney tried to extort more money out of Mr. Rosinski, Mr. Gosney would be in violation of the purchase agreement.

In 2004, upon completing the transaction related to Lot 5, the parties to the sale signed a Real Estate Tax Affidavit affirming that the property price was \$22,000 because Lot 5 was not buildable at the time of the purchase and sale agreement. As expressly stated in the Declarations of Rosinski and Gosney, they considered the property unbuildable in 2000 because there was no sewer service to the area.

Staff has not presented any evidence that contradicts the foregoing facts.

City Review Process.

Mr. Rosinski approached the City of Kirkland in December 2002 to begin the building permit process. As a result of that meeting, Mr. Rosinski retained Wetland Resources to prepare a buffer modification plan. In December, 2003, the assigned City planner, Tony Leavitt, provided a letter to Mr. Rosinski's financial lender documenting (a) that the "subject property is a 'legal building site'" and (b) that a Wetland Buffer Modification/Reduction is a viable option for Mr. Rosinski to allow for construction of one new single-family residence." Exhibit C, Attachment F.

In December, 2003, Mr. Rosinski submitted a wetland buffer modification application. It was not until later in December, 2004, that the City notified Mr. Rosinski that it had changed its determination and would require Mr. Rosinski to withdraw his buffer modification application and submit a new application for reasonable use.

In April, 2005, Mr. Rosinski submitted the reasonable use application that is the subject of this Council's review.

After public hearing and considerable information submitted by Mr. Rosinski, the Hearing Examiner has issued a recommendation to deny the reasonable use application.

The Hearing Examiner found that (a) "the scale of the proposed development is reasonable", (b) the proposed single-family home is the least intensive use of the property with the least impact, (c) the proposed location of the single-family home is reasonable, (d) the single-family home as conditioned with the recommended wetland mitigation would result in the minimum feasible alteration or impairment to the wetland. *Hearing Examiner Recommendation*, pages 4-5. Further, the Hearing Examiner concurred that Mr. Rosinski's inability to derive a reasonable use from the property is not the result of his actions.

Never the less, the Hearing Examiner has recommended denial based solely on his subjective opinion that he does not believe Mr. Rosinski's and Mr. Gosney's declarations that they were not aware of the critical area restrictions on the property that would require a reasonable use approval when the purchase was completed in 2004. The Hearing Examiner failed to either acknowledge or understand that the purchase price was agreed upon in year 2000 under the circumstances that existed at that time. In 2004, when the purchase was completed, Mr. Gosney (the seller) had no legal authority to change the purchase price, even if he wished to, to reflect that a sewer main had been extended the year before. Further, the Hearing Examiner failed to understand or acknowledge that Mr. Rosinski assumed the risk to carry the property until sewer was extended, and in fact had carried that risk for three years by the time sewer was extended.

The Hearing Examiner's recommendation is particularly ironic in light of the fact that even City staff believed up until December, 2004 that Mr. Rosinski had a right to build a single family home on the property without requiring a reasonable use approval.

Substantive Challenge to Hearing Examiner Recommendation.

Mr. Rosinski challenges the Hearing Examiner's recommendation because the recommendation (a) was based on an erroneous application of the law to the facts, (b) is not based on substantive evidence in the record and (c) exceeds the Hearing Examiner's review authority by going beyond the criteria listed in Kirkland Municipal Code.

The Hearing Examiner concurred with Staff that Mr. Rosinski's application complies with the central criteria for granting a reasonable use approval:

- (1) The single-family home has the least impact on the sensitive area and buffer;
- (2) There is no on-site alternative with less impacts; and
- (3) The proposal as conditioned will result in the minimum feasible alteration to or impairment of the functional characteristics of the sensitive area and buffer.

Further, the Hearing Examiner concluded that Mr. Rosinski's inability to derive reasonable use is not the result of Mr. Rosinski's actions.

The Hearing Examiner bases his recommendation of denial solely on his subjective decision not to believe the declarations provided under oath by Mr. Rosinski and Mr. Gosney as to the circumstances surrounding the property transfer.

Mr. Rosinski respectfully requests this Council to take a second look at these declarations and at the applicable time lines:

- July, 2000: Mr. Rosinski and his former wife entered into a written agreement to purchase Lot 5 from Mr. Gosney and his wife.
- On the date of purchase, there was no public sewer available to the property or the area in general.
- The parties agreed to place the burden of risk on Mr. Rosinski as to when public sewer might be extended – this risk was reflected in the property price of \$30,000.
- 2001: Mr. Rosinski transferred title to a parcel in Gold Bar to the Gosneys in lieu of paying a portion of the sales price. As a result, purchase price is reduced to \$22,000.
- Mr. Rosinski continued paying on purchase price.
- 2003: Sewer was extended to the area. City staff advises Mr. Rosinski that a buffer modification would be necessary for building a single family home.
- 2004: Mr. Rosinski completed payment on Lot 5 and title is recorded in his name. Property is transferred for the previously agreed upon purchase price. In the Real Estate Tax Affidavit, the seller and buyer reflect the basis for the low purchase price when the property contract was originally reached in 2000: that the property was unbuildable because no public sewer had yet been extended to the property. Mr. Rosinski also submits an application for buffer modification.

The foregoing are uncontested facts set forth in documentation and declarations made under oath. Even so, the Hearing Examiner simply based his denial on a subjective and personal opinion without any evidentiary support. The Hearing Examiner's decision to disregard declarations made under oath explaining the property's purchase price was not based on any support in the record.

Further, the Hearing Examiner's decision to recommend denial was not based on any criteria relevant to the determination of whether a reasonable use approval is appropriate. The Hearing Examiner focused exclusively on what Mr. Rosinski's subjective knowledge might have been as of 2004. An applicant's subjective knowledge is simply not a criterion for reviewing a reasonable use application under Kirkland Municipal Code.

Further, the Hearing Examiner's comments belie a lack of understanding as to when the real estate contract was formed and the basic tenets of contract law: i.e. that Mr. Rosinski was bound by the contract formed in 2000. The Hearing Examiner erroneously assumed that somehow Mr. Rosinski could have rescinded the sale in 2004 (also failing to acknowledge Staff had affirmatively advised Mr. Rosinski in writing at that time that a buffer modification would be applicable and had never to that point indicated Mr. Rosinski would need to obtain reasonable use approval). As has been established, the real estate contract was formed in 2000, not 2004. Had Mr. Rosinski attempted to rescind the contract in 2004, Mr. Rosinski would have breached his real estate contract.

If this Council were to concur with the Hearing Examiner's recommendation, this Council would preclude any and all use of the property, render the property valueless, and force Mr. Rosinski to forfeit land to the City of Kirkland without compensation and without a legitimate public purpose. Such a decision would constitute an unconstitutional taking and violate Mr. Rosinski's right to substantive due process. *Kahuna Land Co. v. Spokane County*, 94 Wash. App. 836, 841-842 (1999).

The City may not impose a regulation on Mr. Rosinski which denies all economically beneficial or productive use of the land without compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

A city may not deny reasonable use of property solely because a property owner purchased the property after the local jurisdiction adopted regulatory scheme which precludes development. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

Finally, a City may not elevate a subjective belief as to a purchaser's investment-backed expectations to a dispositive status. *Palazzolo*, 533 U.S. 606, 634 (O'Connor concurring opinion). The property purchaser's investment backed expectation is only *one* factor in determining whether a regulation has gone too far. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). In other words, a city may not deny reasonable use of property solely because of a subjective belief on what the purchase price was or the property purchaser was thinking at the time of purchase.

Denial of reasonable use in this situation will destroy all economic and productive viability of the property in an unreasonable and unduly oppressive manner without any public benefit. Denial of reasonable use of Lot 5 based solely on a subjective opinion related to a single elective consideration where all other criteria are met and without factual support in the record would be arbitrary and capricious.

Based on the evidence and argument in the underlying record, and the argument provided herein, Mr. Rosinski respectfully requests this Council to approve the reasonable use application.

Timing of Council Hearing.

Kirkland Municipal Code provides that City Council "shall consider the application at a scheduled meeting within 45 calendar days of the date of issuance of the Hearing Examiner's recommendations on the proposal." KMZ §152.90 (1). Based on that code section, Mr. Rosinski respectfully requests this Council to direct staff to schedule a hearing date within 45 days of the issuance of the Hearing Examiner's recommendation.

Currently, the hearing is scheduled for December 13, 2005, which is 54 days after the postmark date of the decision (or 56 days after the decision was signed). Mr. Rosinski is aware of the Council's regular meeting schedule and, in the event no earlier date is available, stipulates to the hearing date on December 13, 2005. However, Mr. Rosinski respectfully requests that the hearing date not be extended any later as a result of this challenge.

Sincerely,



Duana T. Koloušková

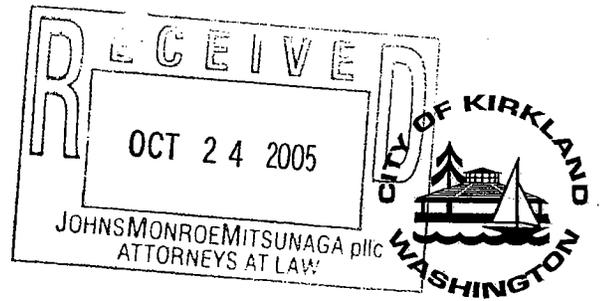
Direct Tel: (425) 467-9966

Email: kolouskova@jmmlaw.com

Enclosure

cc: Tony Leavitt, Planner
Client

1820-1 Challenge to Examiner recommendation 10-27-05



October 21, 2005

Charles Rosinski
P.O. Box 5000-139
Duvall, WA 98019

Dear Mr. Rosinski:

Subject: Process IIB Permit – File No. ZON05-00016

The Hearing Examiner, on October 19, 2005, entered his recommendation on your application. His recommendation is for denial. It is now scheduled to be reviewed by the Kirkland City Council on December 13, 2005 at 7:30 p.m. (or as soon thereafter as possible) in the City Hall Council Chamber, 123 5th Avenue, Kirkland.

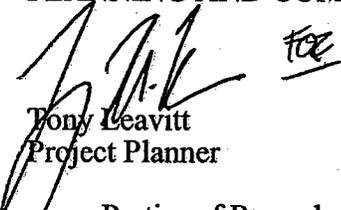
If a timely challenge is filed, the City Council meeting date may be changed. If you or any other eligible party submits a challenge letter, please contact the Planning Department for further information on scheduling.

This is a meeting and not a public hearing. Oral testimony will not be taken at the meeting; however, if a challenge has been filed, the City Council may permit limited argument from the challenger and those parties who filed responses to the challenge.

You will receive an agenda prior to that meeting. If you have any questions, please contact me at (425) 587-3253. All correspondence must refer to File Number ZON05-00016.

Sincerely,

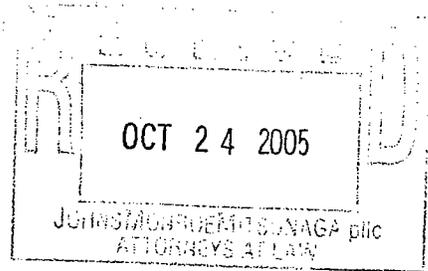
PLANNING AND COMMUNITY DEVELOPMENT


Tony Leavitt
Project Planner

cc: Parties of Record: You will receive no further notification of the meeting. Please note that the meeting date may change if a challenge is filed.

Enclosure: Hearing Examiner Recommendation

TL:sk



**CITY OF KIRKLAND
HEARING EXAMINER FINDINGS,
CONCLUSIONS, AND RECOMMENDATION**

APPLICANT: Charles Rosinski

FILE NO. ZON05-00016

LOCATION: 95xx Slater Avenue NE (see Exhibit A, Attachment 1)

APPLICATION: Request for approval of a reasonable use permit to allow construction of one single-family residence within a wetland buffer (see Exhibit A, Attachment 2). The proposed single-family residence is approximately 3,045 square feet in size and would impact approximately 1,800 square feet of a Type I wetland buffer.

REVIEW PROCESS: Process IIB, Hearing Examiner conducts public hearing and makes recommendation; City Council makes final decision.

SUMMARY OF KEY ISSUES: Compliance with Reasonable Use and General Zoning Code Decisional Criteria (see Exhibit A, Section II.E).

SUMMARY OF RECOMMENDATIONS:

Department of Planning and Community Development: Deny

Hearing Examiner: Deny

PUBLIC HEARING:

After reviewing the official file, which included the Department of Planning and Community Development Advisory Report and after visiting the site, the Hearing Examiner conducted a public hearing on the application. The hearing on the Rosinski application was opened at 7:00 p.m., September 1, 2005, in the Council Chamber, City Hall, 123 Fifth Avenue, Kirkland, Washington, and was closed for oral testimony and legal argument at 7:48 p.m. The hearing was held open administratively until September 30, 2005 to allow the City and the applicant time to submit additional written information into the record. Participants at the public hearing and the exhibits offered and entered are listed in this report. A verbatim recording of the hearing is available in the City Clerk's office. The minutes of the hearing and the exhibits are available for public inspection in the Department of Planning and Community Development.

The following persons spoke at the public hearing:

From the City:

Tony Leavitt, Project Planner
Jeremy McMahon, Planning Supervisor

Staff submitted the staff advisory report (Exhibit A) and gave a PowerPoint presentation (Exhibit B).

From the Applicant:

Charles Rosinski, Applicant
Darrell Mitsunaga, Attorney

Mr. Rosinski reviewed Exhibit C (with attachments).
Mr. Mitsunaga reviewed Exhibit D.

From the Community:

Maxine Keesling
Gwen Anderson
Allison Showalter

Neighboring property owners said they were aware of the wetland regulations and were surprised the applicant wasn't.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

Having considered the entire record in this matter, the Hearing Examiner now makes and enters the following:

FINDINGS AND CONCLUSIONS:

A. Site Description:

1. Site Development and Zoning:

a. Facts:

- (1) Size: 16,500 square feet (.38 acres) according to King County Records.
- (2) Land Use: The subject property is currently vacant.
- (3) Zoning: The subject property is zoned Planned Area (PLA) 17. The PLA 17 zone is considered a Medium Density Zone, however the size of the property only allows for a detached dwelling use.
- (4) Terrain: The subject property has a gradual (approximately 7 percent) slope from the Slater Avenue right-of-way to Forbes Lake. The subject property contains a

Type I Wetland and associated buffer that are located on the east side of the property.

(5) Vegetation: The subject property contains 4 significant trees and a variety of native and nonnative plants, trees and shrubs.

b. Conclusions: Size, terrain, and vegetation as it relates to the existing sensitive area are constraining factors in the consideration of this application. The existing sensitive areas are discussed in Exhibit A, Section II.E and Exhibit E, Attachments 1 & 3.

2. **Neighboring Development and Zoning:**

a. Facts: The subject property is completely surrounded by Medium Density Residential Zoning (PLA 17 and RM 3.6). A majority of these surrounding properties are developed with single-family homes. A couple of the properties contain multi – family dwelling units.

b. Conclusion: Neighboring development and zoning are not constraining factors in the consideration of this application.

B. Correspondence:

1. Facts: The initial public comment period ran from June 30th, 2005 until July 22nd, 2005. One comment letter was received during this time frame (see Exhibit A, Attachment 4). Below is a summary of the comments in the letter along with staff response:

• Impacts to the Existing Flood Plain

In the letter the Neighbor is concerned that any development within the flood plain will have a negative impact on their property.

Staff Response: The applicant is not proposing any work within the flood plain that was surveyed by the applicant's surveyor (see Exhibit A, Attachment 2).

• Storm Water Retention

The neighbor is worried that storm water runoff will impact their property.

Staff Response: Any development on the subject property is required to comply with standards established in the 1998 King County Surface Water Design Manual.

C. State Environmental Policy Act (SEPA) & Concurrency Review:

The project is Categorically Exempt from SEPA Requirements and as a result is exempt from Concurrency Review.

B. Approval Criteria:

Zoning Code section 90.140 establishes two sets of criteria for the review of Reasonable Use applications. The decision maker must consider both sets of criteria in their determination.

1. REASONABLE USE DETERMINATION CRITERIA**a. Facts:**

- (1) Zoning Code section 90.140 states that the decision maker shall determine whether application of Chapter 90 will deny reasonable use of the property, and whether the proposed use and activities are a reasonable use of the property. In making these determinations, the decision maker shall consider the following three criteria:
 - (a) There is no permitted type of land use for the property with less impact on the sensitive area and the buffer is feasible and reasonable; and
 - (b) No on-site alternative to the proposal is feasible and reasonable, considering possible changes in site layout, reductions in density and similar factors; and
 - (c) The proposal, as conditioned, will result in minimum feasible alteration of or impairment to the functional characteristics of the sensitive areas, and their existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and will not cause significant degradation of groundwater or surface-water quality.
- (2) The applicant has submitted a report prepared by Wetland Resources, a qualified professional, that proposes a mitigation plan for the proposed reasonable use application and describes how the complies with the three decisional criteria above (see Exhibit A, Attachment 5). Additionally, the applicant submitted a letter (Exhibit C) that addressed the reasonable use criteria (and reviewed the chronology of his involvement with the subject property. Also, the applicant's attorneys (Duana Kolouskova & Darrell Mitsuaga) submitted letters that address the above decisional criteria (see Exhibit A, Attachment 6, Exhibit D, and Exhibit F).
- (3) The Watershed Company, the City's wetland consultant, has reviewed the Wetland Resources report and concludes the following in their letter (see Exhibit A, Attachment 7):
 - (a) The applicant is proposing a modest sized home on a highly encumbered lot. A modest yard is also proposed, appearing to be just large enough to accommodate provide maintenance access on the sides and rear of the proposed residence. Overall, the scale of the proposed development is reasonable.
 - (b) Wetland Resources is proposing to remove invasive weeds and install native trees and shrubs in buffer areas that would remain outside of the home and yard portion of the lot. Generally, this is an acceptable approach to mitigate for impacts while still allowing reasonable use of the site. However there are a number of problems with the specific details of the proposed mitigation actions including:

- No fence, barrier or signage is proposed to demarcate the yard area from the buffer mitigation area.
- No description of how the removal all non-native vegetation in the mitigation area will be carried out as stated on the plans.
- The species selection of enhancement plantings is appropriate for this site, but planting densities are incorrectly calculated.
- The tree and shrub area should extend farther east to the wetland boundary and there is room for more trees along the southern site boundary from the edge of the proposed yard all the way to the wetland edge.
- Adjust project, monitoring, and maintenance costs as they are too low or not included.
- Soil amendments should be proposed as the soil on the site appears to be historic fill, as it is gravelly and compacted.
- Installation of a temporary irrigation system to help facilitate vegetation growth.
- A five year maintenance and monitoring schedule is more appropriate for this site.
- Establish a schedule for regular maintenance of the mitigation area.
- Incorporation of woody debris and/or bird nest boxes into the plan would increase buffer function with minimum expense

b. Conclusions:

Staff, with the assistance of The Watershed Company, concluded the following in regards to the proposed application's compliance with the adopted approval criteria:

- (1) The proposed single-family use is the least intensive use that is allowed for the subject property. There is no other permitted type of land use for the property that would have a lesser impact on the wetland and associated buffer.
- (2) Within the amount of wetland and buffer area on the subject property, the proposed location of the single-family residence is feasible and reasonable.
- (3) The proposal, as conditioned with the incorporation of the recommendations made by The Watershed Company, would result in minimum feasible alteration of or impairment to the functional characteristics of the sensitive areas, and their existing contours, vegetation, fish and wildlife resources, and hydrological conditions; and will not cause significant degradation of groundwater or surface-water quality. The applicant has indicated he will comply with the recommendations of The Watershed Company (Exhibit C, page 2).

The Hearing Examiner concurs with the conclusions noted above.

2. REASONABLE USE CONSIDERATION CRITERIA

a. Facts:

- (1) Zoning Code section 90.140 states that in determining whether application of this chapter will deny reasonable use of the property, the decision maker shall consider the following:
 - (a) The inability to derive reasonable use is the result of the applicant's actions, such as segregating or dividing property and creating the undevelopable condition, or taking actions in violation of any local, state, or federal law or regulation; and
 - (b) The land use and environmental regulations, which prevent reasonable use of the property, were in effect at the time of purchase of the property by the applicant.
- (2) The subject property contains approximately 15,790 square feet of land area above the approximate high water line (see Attachment 2). The Type I Wetland occupies nearly half of this total land area. The required 100-foot buffer from the wetland edge occupies a majority of the remaining land area. Approximately 100 square feet of the property's land area is outside of the wetland and buffer.
- (3) The subject property was originally platted as part of the Burke and Farrar's Kirkland Addition to the City of Seattle, Division 14 in July of 1911.
- (4) The current Sensitive Area Regulations (Zoning Code Chapter 90) were adopted in April of 2002.
- (5) According to the Real Estate Excise Tax Affidavit (see Exhibit A, Attachment 8), the applicant purchased the subject property on July 8, 2004 for a total of \$22,000. Attached to this document is a statement sign by Mr. Rosinski that states the following:

This is to certify that at the time of purchase and sale agreement the property was unbuildable. Therefore the sales price is a reflection of that and is our true sales price of \$22,000.00"

Mr. Rosinski testified, wrote in Exhibit C, and declared in Attachment 2 to Exhibit F that he and his ex-wife purchased the subject property in 2000, but did not take possession of the property, pay off the debt on the property and have the transaction recorded until 2004. He also wrote that he was unaware he would need a reasonable use exception until late in the year of 2004. He also testified and wrote that the reason the price of the property was so low was that he had traded another piece of property for a portion of the price, and he certified that it was "unbuildable" when he purchased it because there was no sewer to the property.

Staff has countered that the regulations in effect in 2000 were essentially the same (as they relate to the subject property) as the current regulations found in DZC 90.140, which was adopted in April 2002 (See Exhibit E). Staff noted in Exhibit E (page 3) that a sewer line was installed and completed within the Slater Avenue

right-of-way in late 2003. A letter was sent to Mr. & Mrs. Gosney, property owners of record in January 2004, which stated that a sewer line was extended in front of the property and that the property is subject to a Latecomer's Agreement. Furthermore, a sewer line is depicted on the site plan that was prepared for Mr. Rosinski in December of 2003 (Exhibit A, Attachment 2).

- (6) The applicant's attorneys have argued that Section 90.140 requires that the decision maker "consider" the criteria and not rely solely on Section 90.140.2 as justification for rejection of the reasonable use (See minutes of the hearing, and Exhibits D & F)
- (7) Staff has asked that the Hearing Examiner consider the applicant's constructive and actual knowledge of the regulations and sewer availability at the time of purchase (See Exhibit E).

b. Conclusions

- (1) The subject property was created as part of a recorded plat in July of 1911. As a result, the inability to derive reasonable use is not a result of the applicant's actions.
- (2) The applicant completed the purchase of the subject property in July of 2004, well after the current Sensitive Area Regulations were adopted. The applicant certifies, as part of the Real Estate Excise Tax Affidavit, that the property is unbuildable and the price that the applicant paid for this property reflects this fact. Given the documents in the record the Hearing Examiner finds it incredulous to assume that the applicant and the previous property owner were unaware that the property was encumbered by the current City of Kirkland Sensitive Area Regulations (or previous regulations, which similarly encumbered the subject property), or that they were unaware there was a sewer to the property when the purchase was completed.
- (3) As a result, the Examiner concludes that the proposed reasonable use application should be denied based on the fact that the applicant knew (or as the record shows, clearly should have known) the property was unbuildable when he purchased the property.

3. GENERAL ZONING CODE CRITERIA

- a. Fact: Zoning Code section 152.70.3 states that a Process IIB application may be approved if:
 - (1) It is consistent with all applicable development regulations and, to the extent there is no applicable development regulation, the Comprehensive Plan; and
 - (2) It is consistent with the public health, safety, and welfare.
- b. Conclusion: As fourth in Section II.D.2 of Exhibit A, the application is not consistent with the criteria for approval of the reasonable use application and, therefore the proposal does not comply with the criteria in section 152.70.3. It is not consistent with all applicable development regulations.

C. Comprehensive Plan:

1. **Fact:** The subject property is located within the North Rose Hill neighborhood. The North Rose Hill Neighborhood Land Use Map designates the subject property for Medium Density Uses (see Exhibit A, Attachment 9).
2. **Conclusion:** The proposed single-family use is consistent with the Comprehensive Plan for the North Rose Hill Neighborhood.

D. Development Review Committee:

1. **Fact:** Comments and requirements placed on the project by the Building Department can be found on the Development Standards Sheet, Exhibit A, Attachment 3.
2. **Conclusion:** If the project were to be approved, the applicant would be required to comply with these comments and requirements as set forth in Exhibit A, Attachment 3.

RECOMMENDATION:

Based upon the foregoing findings of fact and conclusions, denial of this application is recommended. If the City Council adopts different findings and conclusions and approves this application, the Hearing Examiner recommends the conditions set forth in Exhibit A, Attachment 3 be required.

EXHIBITS:

The following exhibits were offered and entered into the record:

- A. Department of Planning and Community Development Staff Advisory Report, with attachments:
 1. Vicinity Map
 2. Development Proposal
 3. Development Standards
 4. Public Comment Letter from Gwen Anderson
 5. Sensitive Area Study for Reasonable Use prepared by Wetland Resources, Inc
 6. Application Letter prepared by Duana Kolouskova
 7. The Watershed Company Review Letter
 8. Copy of Real Estate Excise Tax Affidavit Form
 9. North Rose Hill Neighborhood Land Use Map
- B. PowerPoint Presentation
- C. Hearing presentation of Charles B. Rosinski, with attachments:
 - a. Land purchase proposal for lot 5, dated 7/9/05
 - b. Agreement to sell Real Estate, dated 3/1/01 & 2/28/01
 - c. Agreement to sell Real Estate, dated 3/27/01
 - d. Deed of Trust, recorded 4/17/01
 - e. Letter from Keith & Kimiko Gosney, undated

- f. Letter from Tony Leavitt, dated 12/8/03
- g. Letter from Charles Rosinski, dated 8/20/04
- h. Application Form: Zoning Permit – wetland buffer modification
- i. Letter from Duana Kolouskova, dated 1/12/05
- j. Letter from Duana Kolouskova, dated 4/28/05, with attachments:
 - 1) Application Form: Zoning Permit – reasonable use
 - 2) Site Plan
 - 3) Legal Description
- D. Letter from Darrell Mitunaga, dated 9/1/05
- E. Memo from Tony Leavitt, Jeremy McMahon, and Robin Jenkinson, dated 9/15/05, with attachments:
 - 1. Wetland Resources Inc. Report, dated 8/20/03
 - 2. Wetland Delineation Review Contract
 - 3. Wetland Delineation Review Letter
 - 4. Ordinance Numbers 3658, 3706, and 3742
 - 5. Slater Avenue NE Sanitary Sewer Latecomer's Assessment Letter
- F. Letter from Duana Kolouskova, dated 9/29/05, with attachments:
 - 1. Declaration of Keith Gosney
 - 2. Declaration of Charles Rosinski

PARTIES OF RECORD:

Charlie Rosinski, PO Box 5000-139, Duvall, WA 98019

Darrell Mitsunaga, Johns Monroe Mitsunaga PLLC, 1500 114th Avenue SE, Suite 102, Bellevue, WA 98052-2812

Duana Kolouskova, Johns Monroe Mitsunaga PLLC, 1500 114th Avenue SE, Suite 102, Bellevue, WA 98052-2812

Gwen Anderson, 9506 Slater Avenue NE, Kirkland, WA 98033

Maxine Keesing, 15241 NE 153rd Street, Woodinville, WA 98072

Allison Showalter, 9252 Slater Avenue NE, Kirkland, WA 98033

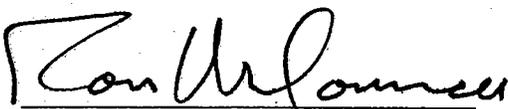
City Attorney

Department of Planning and Community Development

Department of Public Works

Department of Building and Fire Services

Entered this 19th day of October 2005, per authority granted by Section 152.70, Ordinance 2740 of the Zoning Code. A final decision on this application will be made by the City Council. My recommendation may be challenged to the City Council within seven (7) working days as specified below.



Ron McConnell, FAICP
Hearing Examiner

CHALLENGES AND JUDICIAL REVIEW

The following is a summary of the deadlines and procedures for challenges. Any person wishing to file or respond to a challenge should contact the Planning Department for further procedural information.

G. CHALLENGE

Section 152.85 of the Zoning Code allows the Hearing Examiner's recommendation to be challenged by the applicant or any person who submitted written or oral comments or testimony to the Hearing Examiner. A party who signed a petition may not challenge unless such party also submitted independent written comments or information. The challenge must be in writing and must be delivered, along with any fees set by ordinance, to the Planning Department by 5:00 p.m., 10/28/05, seven (7) calendar days following distribution of the Hearing Examiner's written recommendation on the application. Within this same time period, the person making the challenge must also mail or personally deliver to the applicant and all other people who submitted comments or testimony to the Hearing Examiner, a copy of the challenge together with notice of the deadline and procedures for responding to the challenge.

Any response to the challenge must be delivered to the Planning Department within seven (7) calendar days after the challenge letter was filed with the Planning Department. Within the same time period, the person making the response must deliver a copy of the response to the applicant and all other people who submitted comments or testimony to the Hearing Examiner.

Proof of such mail or personal delivery must be made by affidavit, available from the Planning Department. The affidavit must be attached to the challenge and response letters, and delivered to the Planning Department. The challenge will be considered by the City Council at the time it acts upon the recommendation of the Hearing Examiner.

H. JUDICIAL REVIEW

Section 152.110 of the Zoning Code allows the action of the City in granting or denying this zoning permit to be reviewed in King County Superior Court. The petition for review must be filed within twenty-one (21) calendar days of the issuance of the final land use decision by the City.

RESOLUTION R- 4541

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND DENYING THE ISSUANCE OF A PROCESS IIB PERMIT AS APPLIED FOR IN DEPARTMENT OF PLANNING AND COMMUNITY DEVELOPMENT, FILE NO. ZON05-00016, BY CHARLIE ROSINSKI FOR A REASONABLE USE PERMIT TO CONSTRUCT A NEW SINGLE FAMILY RESIDENCE BEING WITHIN A PLA 17 ZONE.

WHEREAS, the Department of Planning and Community Development has received an application for a Process IIB permit filed by Charlie Rosinski, the owner of said property described in said application and located within a PLA 17 zone;

WHEREAS, the application has been submitted to the Kirkland Hearing Examiner who held a public hearing thereon at his regular meeting(s) of September 1st; and

WHEREAS, pursuant to the State Environmental Policy Act, RCW 43.21C, and the Administrative Guidelines and local ordinance adopted to implement it, this action is exempt from the environmental checklist process; and

WHEREAS, the Kirkland Hearing Examiner after his public hearing and consideration of the recommendations of the Department of Planning and Community Development did adopt certain Findings, Conclusions, and Recommendations and did recommend denial of the Process IIB permit subject to the specific conditions set forth in said recommendations; and

WHEREAS, the City Council, in regular meeting, did consider the recommendation of the Hearing Examiner, as well as a timely filed challenge of said recommendation.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Kirkland as follows:

Section 1. The Findings, Conclusions, and Recommendations of the Kirkland Hearing Examiner as signed by him and filed in the Department of Planning and Community Development File No. ZON05-00016 are adopted by the Kirkland City Council as though fully set forth herein.

Section 2. The Process IIB permit shall be denied.

Passed by majority vote of the Kirkland City Council in open meeting
this _____ day of _____, 20_____.

Mayor

ATTEST:

City Clerk