



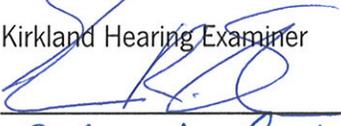
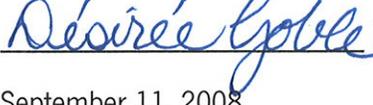
CITY OF KIRKLAND

Planning and Community Development Department
123 Fifth Avenue, Kirkland, WA 98033 425.587.3225
www.ci.kirkland.wa.us

ADVISORY REPORT

FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

To: Kirkland Hearing Examiner

From:  Eric R. Shields, AICP, Planning Director, SEPA Responsible Official
 Désirée Goble, AICP, Project Planner

Date: September 11, 2008

Subject: APPEAL OF A STATE ENVIRONMENTAL POLICY ACT (SEPA) DETERMINATION (APPEAL FILE NO: APL08-00006) AND ZONING PERMIT FOR THE SABEGH STREAM BUFFER MODIFICATION REQUEST (APPEAL FILE NO: APL08-00009)

Hearing Date and Place: Thursday, September 18, 2008 at 9:00 a.m.
City Hall Council Chamber
123 Fifth Avenue, Kirkland

I. INTRODUCTION

- A. Applicant and Appellant: Anthony Sabegh, 6413 Lake Washington Blvd., Kirkland, WA 98033.
- B. Development Process: The applicant has proposed a stream buffer modification with enhancement to allow construction of five detached structures on the property which requires Process I review pursuant to the Kirkland Zoning Code Chapter 145 (see Exhibit A). The applicants proposed uses is based under the Business Commercial (BC) regulations as allowed Resolution 2639 refer to Exhibit A, Section II.B for a more detailed explanation.
1. Environmental review of the project was required since installation of a culvert was proposed to provide access across the stream, the proposal included more than 4,000 square feet of gross floor area of office/commercial requiring more than 20 parking stalls, and restoration of the steam bed was proposed. Through SEPA review, a significant safety concern was identified regarding the proximity of the subject property to the intersection of 6th Street South and NE 68th Street. The applicant was required to restrict ingress/egress to the property to right turns only and extend the existing "c-curb" located in the right-of-way to the eastern side of the property. A mitigated determination of non-significance (MDNS) was issued on May 22nd, 2008. See Exhibit A, Attachment 6 for the SEPA determination and Exhibit B for the material supporting the SEPA determination.
 2. The appellant submitted an appeal to the SEPA determination on June 4, 2008 within the time limit for appeal, which ended on June 5, 2008 (see Exhibit C).
 3. The stream buffer reduction with enhancement project received preliminary approval with conditions on July 17, 2008, (see Exhibit A). An appeal of the Planning Director's decision was filed on August 11, 2008 within the time limit for the appeal (see Exhibit D).

C. Action Being Appealed:

1. Issues Raised in the SEPA Appeal: The appellant is requesting that the Mitigated Determination of Non-significance (MDNS) reviewed under SEPA rules, and issued by the City of Kirkland on May 22, 2008 be modified to restrict left turn ingress/egress to the property only Monday through Friday during "rush hour".
2. Issues Raised in the Zoning Permit Appeal: The applicant has identified the eight issues that he wishes to appeal: the requirement to convert the willow tree to a habitat tree; grant a timeline extension to the requirement to rehabilitate the stream; reduce the stream buffer further since the City is requiring right of way dedication; allow the driveway to extend directly north without curving to the west; eliminate the zoning code required landscape buffer requirements; explain the NGPE requirement; allow one written contract with a professional for both construction and monitoring of the stream buffer; and phased construction.

II. SEPA APPEAL

A. Hearing Scope And Considerations

1. KMC 24.02.105(g)(2) limits participation in a SEPA appeal to the applicant, any agency with jurisdiction, and any individual or other entity who is specifically and directly affected by the proposed action. These persons may participate in the appeal in either or both of the following ways:
 - a. By submitting written testimony to the planning department by the appeal deadline; or
 - b. By appearing in person, or through a representative, at the hearing and submitting oral or written testimony directly to the hearing body. The hearing body may reasonably limit the extent of the oral testimony to facilitate the orderly and timely conduct of the hearing.
 - c. One letter regarding the SEPA determination was submitted prior to the appeal deadline (see Exhibit E).
2. KMC 24.02.105.i (1-4) additional appeal procedures states:
 - a. The matters to be considered and decided upon in the appeal are limited to the matters raised in the notice of appeal.
 - b. The decision of the responsible official shall be accorded substantial weight.
 - c. All testimony will be taken under oath.
 - d. The decision of the hearing body hearing the appeal shall be the final decision on any appeal of a threshold determination including a mitigated determination of nonsignificance.

B. Decision on the SEPA Appeal

Pursuant to KMC 24.02.105(h)(1), the Hearing Examiner shall consider all information and material within the scope of the appeal submitted by persons entitled to participate in the appeal and shall:

1. Affirm the decision being appealed;

2. Reverse the decision being appealed; or
3. Modify the decision being appealed.

C. Staff Analysis Of Issues Raised In The SEPA Appeal:

1. **Appellant's Issue:** The appellant is requesting the ingress/egress only be restricted to right turns during rush hour on Monday through Friday.
2. **Staff Response:** On May 15, 2008, the applicant met with Thang Nguyen, City of Kirkland Transportation Engineer, and David Godfrey, Transportation Engineering Manager to discuss alternatives to the proposed SEPA mitigation measures. After the meeting the appellant directed Staff to issue the SEPA determination (see Exhibit F). The appellant filed a SEPA appeal on June 4, 2008 (see Exhibit C).

Thang Nyguen, City of Kirkland Transportation Engineer, wrote a memorandum addressing the specifics of the appeal (see Exhibit G). He is recommending that the SEPA determination be affirmed and the Mitigated Determination of Nonsignificance be upheld for a variety of reasons outlined in the memorandum.

III. ZONING PERMIT APPEAL

A. Hearing Scope And Considerations

1. KZC 145.70 limits participation in a Stream Buffer Modification appeal to the applicant, and any person who submitted written comments or information to the Planning Director on the application. These persons may participate in the appeal in either or both of the following ways:
 - a. By submitting written comments or testimony to the Hearing Examiner prior to the commencement of the hearing.
 - b. By appearing in person, or through a representative, at the hearing and submitting oral testimony directly to the Hearing Examiner. The Hearing Examiner may reasonably limit the extent of the oral testimony to facilitate the orderly and timely conduct of the hearing.
2. KZC 145.75 states that the scope of the appeal is limited to the specific factual findings and conclusions disputed in the letter of appeal.
3. KZC 145.95 states that the person filing the appeal has the responsibility of convincing the Hearing Examiner that the Planning Director made an incorrect decision.

B. Decision on the Zoning Permit Appeal

KZC 145.105 states that the Hearing Examiner shall consider all information and material within the scope of the appeal submitted by persons entitled to participate in the appeal. Based on the Hearing Examiner's findings and conclusions, he/she shall either:

1. Affirm the decision being appealed;
2. Reverse the decision being appealed; or
3. Modify the decision being appealed.

C. Staff Analysis Of Issues Raised in the Appeal of the Stream Buffer Modification (Zoning Permit).

Exhibit D is the appeal letter. Eight issues were raised in the appeal each item is analyzed below.

1. **Condition** I.B.4 reads as follows: *“This case will be referred back to code enforcement if a Land Surface Modification (LSM) permit for the stream enhancement is not issued by July 1, 2009 and all work is (not) completed by September 30, 2009 (see Conclusion II.B.2).”*

Appellant’s Issue: The appellant has indicated the he is planning on applying for a land surface modification (LSM) (grading) permit to install the buffer enhancement and an underground parking garage at the same time. Therefore, he has request that condition of approval I.B.4 be removed.

Staff Response: In March 2006, the appellant created a narrow deep channel without the required permits, as explained in Section II.B.1.b of the staff report. A cease and desist was issued June 21, 2006 and a Notice of Violation and Order to Correct requiring the applicant to restore the stream was issued on August 2, 2006. Eric Shields, Planning Director, and Nancy Cox, Development Review Manager, met with Anthony Sabegh at his request. Mr. Sabegh stated that he was ready to apply for a stream buffer modification and asked that the stream restoration requirement be processed concurrently. Staff agreed to this request. An application was submitted on August 15, 2006, a determination of completeness was issued on May 29, 2007, and all of the information needed to proceed with the writing the Staff Report for the stream buffer modification was submitted on November 1, 2007.

There is a very narrow “window of opportunity” when Washington State Department of Fish and Wildlife will authorize work within a stream. The condition of approval was intended to provide the applicant sufficient time to acquire the required permits and implement the stream enhancement work that was required as part of the Notice or Violation and Order to Correct on August 2, 2006. It is not the intent of staff that the appellant be required to implement the stream buffer modification aspect of the proposal until he is ready to proceed with the development of the property. Staff is aware of three separate flooding incidents that have occurred at the site west of the subject property since the original violation that occurred in March 2006. Additionally, work has continued to occur within the stream since the Notice of Violation and Order to Correct have been issued.

2. **Condition** I.B.6.d reads as follows: *“As part of the application for a Land Surface Modification or Building Permit the applicant shall relocate the driveway and pedestrian access to the west side of the property or submit written authorization from the adjoining property owner(s) to the west agreeing to the removal of the stream from the existing culvert (see Conclusion II.F.3.b and II.F.5.b).”*

Appellant’s Issue: First, the appellant requests that access to the north side of the property be permitted as proposed. He argues that the location of the buildings on southwest side of the property will extend 28 feet from the west property line and bending the driveway to the west would lead to an unsafe situation.

Second, the appellant states that the city should not require consent from the adjoining property owner in order to remove the existing culvert.

Staff Response: Installing a culvert in a stream is regulated by KZC section 90.115. Subsection 2.f states, “Neither the installation, existence, nor operation of the culvert will be detrimental to any other property or to the City as a whole.” The applicant has proposed installing a 25-foot long culvert at the center of the property and removing the existing culvert along the west side of the property. Installing a straight driveway to the buildable area located on the north side of the stream will result in a fragmented stream

and stream buffer as shown in Exhibit A, Attachment 11. Stream fragmentation is considered an adverse habitat impact (see Exhibit A, Attachment 7.1) and would mean that project would not comply with KZC 90.115.2.b. The appellant argues that curving the driveway towards the west property line will result in an unsafe driving situation. However, he has provided no support from a civil or traffic engineer to support this assertion. This would result in the Staff changing their recommendation on the proposed project from approval with conditions to denial.

Removal of a culvert is regulated by KZC section 90.105. This section requires that affected property owners be notified and agree to the change in writing. Specifically, the section reads as follows "If the proposed stream activity will result in the creation or expansion of a stream 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." This requirement is intended to prevent the creation of non-conformances and assure that the adjoining properties owners are notified of any potential impacts to their property. Removal of the existing culvert would extend the stream buffer onto at least two adjoining properties to the west, possibly three, and increase at least one and possibly create two additional non-conforming structures.

3. **Condition** I.B.3 reads as follows: *"Trees shall not be removed or altered following zoning permit approval except as approved by the Planning Department. Attachment 3, Development Standards, contains specific information concerning tree retention requirements."*

Appellant's Issue: The appellant would like to remove the willow tree because it will interrupt the driveway access to the area of the property north of the stream. He is willing to replant a new willow tree a few feet to the east of the new driveway access.

Staff Response: The tree is located within the current stream buffer and eventual modified stream buffer. On December 21, 2006 the appellant received authorization to convert the tree into a habitat tree (refer to Exhibit A, Attachment 4). Habitat trees are allowed to be cut in such a manner that they do not pose a hazard to any surrounding structures and provide animal habitat. The applicant was required to relocate that access driveway to the west side of the property making this request immaterial.

4. **Condition** I.B.5 reads as follows: *"Dedicate a strip of land to the City along the property frontage on NE 68th Street that is 12 feet wide from the west property line to the east side of the proposed driveway; from the east side of the proposed driveway, the 12-foot wide dedication shall taper to 5 feet in width at the east property line to allow installation of a right turn lane and bike lane (see Conclusion II.G.1.b)."*

Appellant's Issue: The appellant either wants an additional 6-foot buffer reduction from either side of the storm water ditch that the City has identified as a stream or that the city be required to purchase the land at fair market value.

Staff Response: The stream buffer and right-of-way acquisition are two separate and distinct issues. KZC section 90.100.1.b states "Buffers may not be reduced at any point by more than one-third of the standards..." which was requested and approved with conditions. The CIP process includes an established process for determining the fair market value of the land. Either the City will pay the property owner the value of the land to be acquired (assuming that the CIP project moves forward first) or the applicant will receive a credit to be used towards the road impact fees that will be assessed for the project (assuming that the applicants project moves forward first). Furthermore, the

applicant was not required to make right-of-way improvements such as widening the sidewalk, or installing curb and gutter since the City will be doing this work as part CIP project.

5. **Condition** I.B.6.e reads as follows: *“As part of the application for a Land Surface Modification or Building Permit the applicant shall apply for a landscape buffer modification for the area located on the northwest side of the stream pursuant to requirements of KZC Section 95.40.6.j (see Conclusion II.G.2.b).”*

Appellant’s Issue: The appellant believes the only landscape buffer that should be applied to the proposal should be on the east and north property line based on the requirements of Resolution-2639. The appellant further states that the adjoining properties on the west are zoned Business Commercial (BC) and therefore, the City should not require an additional landscape buffer. Bill Anspach owns the adjoining property on the northwest side and has confirmed that he is preparing plans to build retail and offices uses on his land.

Staff Response: Resolution 2639 states *“...be permitted to develop in accordance with and subject to the provisions of the BC chapter of the Kirkland Zoning Code; conditioned, nevertheless upon installation of a landscaped buffer 15 feet in width along the North line of said described real property and 10 feet in width along the east line of said property.”* (see Exhibit H). This resolution allows the subject property to be developed as Business Commercial (BC) providing that the stipulated landscape buffer width required on the north and east sides of the property are provided. All remaining requirements of the BC use zone chart are to be met including the required landscape buffer for the remaining property lines. KZC 95.40.4 establishes that land use buffers are determined by the use that exists on the adjoining property not the proposed or future use of the property. KZC95.40.6.j allows the City to approve a modification if the established criteria are met.

6. **Condition** I.B.6.i reads as follows: *“As part of the application for a Land Surface Modification or Building Permit the applicant shall submit a survey map and legal description showing the outline and dimensions of the Natural Greenbelt Protective Easement (see Conclusion II.G.7.b). The map and legal description shall be prepared by a licensed surveyor. This information shall be provided on 8.5-inch by 11-inch paper and consist of the following.*

- (1) The survey shall be located on the KCAS or plat bearing system and tied to known monuments.*
- (2) A metes and bounds legal description of the stream buffer located on the subject property showing all radii, internal angles, points of curvature, tangent bearings, and lengths of all arcs.*
- (3) Surveyor’s certificate completed and seal signed.*
- (4) On a separate sheet, provide the legal description of the entire parcel.”*

Appellant’s Issue: The appellant states that he does not understand this item and was not aware of this requirement.

Staff Response: KZC Section 90.150 requires the applicant to record a Natural Greenbelt Protective Easement (NGPE). The notes distributed at the pre-submittal meeting specifically identified this requirements. A copy of Chapter 90 – Drainage Basin Regulations has also been provided to the applicant. The specific requirements identified as item 1-4 are intended to clarify the required information necessary for the creation of the NGPE document to be recorded with King County.

7. **Condition** I.B.7.b reads as follows: “Prior to final inspection the applicant shall submit proof of a written contract with a qualified professional who will perform the monitoring and maintenance program outlined in Attachment 8.a (see Conclusion II.F.1.b).”

Appellant’s Issue: The appellant wants to provide one written contract with a professional to monitor the “buffer modification project while under construction and for the future maintenance monitoring”.

Staff Response: It is a private decision that does not involve the City if the appellant wants to use the same person/company to implement the buffer modification, maintenance, and monitoring. However, certain aspects are required to be completed by a biologist, such as the monitoring report, while others can be accomplished under their supervision and or direction, such as the maintenance and installation of the plantings. If the appellant is requesting to submit one security for all of the work to occur on the site, the City is agreeable. However, this usually requires that the applicant provide a larger financial security initially and will require a longer a security duration than typically required by the conditions of approval. The security requirements are outlined in Conditions I.B.6.h and I.B.7.f.

8. **Appellant’s Issue:** Additionally, the appellant “would like the city to not obligate me for the one time only construction, but allow me to build my (one time only proposed submitted building plans) in several construction parts. I will provide the city with one time building plans and I would like to request the construction of each proposed building plan in deferent construction phase/period.”

Staff Response: Interpretation 04-1 (see Exhibit A, Attachment 5), Page 2, Item D states “*Only the first development of each of these properties is controlled by R-2639. First subsequent to July 16, 1979. After a subject property is first developed, R-2639 shall be moot as to such property*”. In order for multiple buildings to be constructed on the site under the BC zoning, the applicant needs to submit one set of plans for the entire construction project. Under the International Building Code (IBC) building permit must be issued within 18 months of application or it is void and the application process starts over again. A building permit for commercial construction is good for three years from date of issuance and then it expires. Also, the applicant will need to comply with the time constraints of the Zoning Permit that can be found in the Lapse of Approval section of Exhibit A.

IV. RECOMMENDATION

Staff recommends that the SEPA determination be affirmed and that the Mitigated Determination of Nonsignificance (MDNS) be upheld.

Staff recommends that the Zoning Permit for the Stream Buffer Modification Request be affirmed and the Directors Decision be upheld.

V. JUDICIAL REVIEW

A. SEPA Determination (KMC 24.02.110)

Judicial review of SEPA determinations are by RCW 43.21C.075 required to be heard only at the time of judicial review of the underlying action, i.e. approval or disapproval of the proposal for which SEPA review was required. For rules on perfecting and timing of the SEPA determination and judicial appeal, see RCW 43.21C.075 and WAC 197-11-680(4). The notice required by WAC 197-11-680(5) shall be appended to the permit or notice of appeal at the time of final city action. (Ord 2830 Part 7, § 1 (part), 1984).

B. Zoning Permit (KZC 145.110)

The action of the City in granting or denying an application under this chapter may be reviewed pursuant to the standards set forth in RCW 36.70C.130 in the King County Superior Court. The land use petition must be filed within 21 calendar days of the issuance of the final land use decision by the City. For more information on the judicial review process for land use decisions, see Chapter 36.70C RCW.

VI. EXHIBITS

- A. Stream Buffer Modification (ZON06-00025) Staff Report
- B. Supporting SEPA Documentation
- C. SEPA Appeal letter from Anthony Sabegh received June 4, 2008
- D. Zoning Appeal letter from Anthony Sabegh received August 11, 2008
- E. E-mail correspondence regarding the SEPA Determination
- F. E-mail directing Staff to issue the MDNS
- G. Public Works Appeal Response Letter from Thang Nguyen, Transportation Engineer
- H. Resolution 2639