

## HEARING EXAMINER MINUTES – FEBRUARY 2, 2006

### CALL TO ORDER:

The February 2, 2006 meeting was convened by the Hearing Examiner Pro Tem Anne Watanabe at 9:04 a.m. Susan Greene and Jeremy McMahan represented the Department of Planning and Community Development, Denise Pirolo represented Public Works and Oscar Rey represented the City Attorney's office.

### **PUBLIC HEARING: Weinberger Wetland Buffer Modification, File No. ZON05-00018**

Ms. Watanabe swore in Staff Planner Susan Greene. Ms. Greene presented the staff report, identifying a formatting error on pages 8 and 9. Ms. Watanabe entered the Staff Report as Exhibit A and the corrected pages as Exhibit B.

Ms. Greene identified the applicant, Nathan and Debra Weinberger, 10530 NE 108<sup>th</sup> Street. She displayed a site plan and identified the subject property and the RS8.5 single family zoning designation. She described the Weinberger's request for a wetland buffer modification via enhancement as allowed by the Kirkland Zoning Code. Ms. Green identified the property on a sensitive areas map, explaining the subject property was located within 100 feet of a Type I wetland. Chapter 90, Section 45 of the Kirkland Zoning Code requires a 100-foot wetland buffer and a 10-foot setback for all improvements.

Ms. Greene displayed a site plan submitted by the applicant as part of the proposed wetland buffer modification, identifying the line of wetland edge as delineated by Adolfsen & Associates and surveyed by the applicant, the 100-foot buffer line, 10-foot building setback, the end of the fully developed right-of-way and the gravel path. She described the applicant's proposal, 1) enclose an existing porch to use as interior space, 2) construct a patio in back of home, a small portion of which is within the 100 buffer, 3) include the rockeries constructed with a building permit that extend into the buffer in this buffer modification, and 4) permanently move the buffer line. She summarized the Kirkland Zoning Code allowed a maximum reduction of 1/3 of the buffer or in this case, 33 feet. The applicant's request varied from 10 feet to 33 feet. She explained the reason for the applicant's proposal to permanently move the buffer line was to allow them the ability to rebuild the exiting portion of home within 100 buffer in the event the home was damaged/destroyed.

Ms. Greene described the two types of buffer modification allowed by the Kirkland Zoning Code, buffer averaging and buffer enhancement. She explained buffer enhancement required that the applicant demonstrate that via enhancing the buffer, the reduced buffer would function at a higher level than the existing buffer. She described requirements of the enhancement plan; Section 90.55 of the Kirkland Zoning Code requires a five-year monitoring and maintenance period and outlined requirements for a successful enhancement plan.

Ms. Greene advised modification requests for Type I wetland buffer modification were considered by the Hearing Examiner via Type IIA process and shall be approved only if the proposal meet nine decisional criteria contained in Section 90.60 of the Kirkland Zoning Code. She briefly reviewed the criteria and how the applicant's proposal met the criteria.

Ms. Greene advised the enhancement plan submitted by the applicant dated December 29, 2005, contained in Attachment 7 of the Staff Report, was reviewed by City staff and the City's

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wetland consultant who found if the recommendations of approval listed in Section 1B of the Staff Report and the development standards in Attachment 3 of the Staff Report were followed, the proposed porch enclosure, rockeries and patio could meet the criteria. Staff also found the applicant's request to move buffer line permanently would meet the nine criteria if no additional structures or permanent improvements were installed in the former buffer area and uses in this area were limited to garden/landscaping. Staff also found approval of this request would not necessarily result in a permanently fixed buffer line as future changes in the size and location of the wetland or changes in the Kirkland Zoning Code regulations regarding buffer size may impact any future development proposals.

Ms. Greene referred to recommendations made by the City's consultant, The Watershed Company, contained in Attachments 5 and 7 of the Staff Report. She presented an addendum to the recommendation section of the Staff Report that reflected changes requested by the applicant's counsel. Ms. Watanabe entered the addendums as Exhibit C. Ms. Greene reviewed the original recommendations, noting the following addendums:

- Replace Section I.B.2.c with: "Plant Oregon Grape along the southern of the buffer enhancement area with a sufficient number of plants to discourage intrusion into the enhancement area. Include a requirement that a diversity performance standard apply to native plants only and only one sign shall be required along the southern edge of the enhancement area within the City right-of-way. The applicant may design the sign and shall submit the design to the Planning Department prior to having it made.
- Revise I.B.3.c to read: "Submit a final planting plan showing the location and species of the plantings, the location of the Oregon grape barrier and signage and location of the temporary irrigation lines."
- Replace I.B.5 with: "The existing Natural Growth Protection Easement area recorded in 1994 on the southwest portion of the subject property shall remain as it currently exists. A new NGPE area for the southeast portion of the subject property shall be submitted for approval to be recorded with King County Records and Elections. The NGPE shall cover the area depicted as the east enhancement area on the December 29, 2005 site plan prepared by R.W. Thorpe and Associates. The applicant shall have a surveyor prepare a legal description of the easement area.

Ms. Watanabe asked for clarification regarding what would happen if the wetland became larger and the buffer expanded. Ms. Green advised this would only arise if the applicant submitted a new proposal; the wetland would then need to be re-delineated as the current delineation was in effect for two years.

Ms. Watanabe inquired regarding the mechanism for ensuring the monitoring and maintenance plan. Ms. Greene advised the bonding requirements were contained in Attachment 3 of the Staff Report. Section 90.145 of the Kirkland Zoning Code required a performance bond to ensure the plantings were done and a maintenance security would be required to ensure maintenance for five years.

Ms. Watanabe swore in Mike Zeno, 4020 Lake Washington Blvd, Ste 100, Kirkland, who submitted a binder containing the applicant's proposed findings, conclusions and decision in hard copy as well as on a disk. Ms. Watanabe entered the notebook as Exhibit D.

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Mr. Zeno identified areas where the applicant disagreed with the Staff Report. He referred to Section I.A.3 which described the applicant's request, pointing out the applicant's request had changed over time. He provided a chronology of how their request had changed and what motivated the changes: the original request in December 2004 was to move the front door and enclose the landing outside the front door. The applicant was told he could move the front door but could not enclose the landing because the landing was with the wetland buffer. He referred to photographs of the landing in Tab 3 of Exhibit D. At the City's request, the applicant revised their request to eliminate enclosure of the landing and only move the front door which was granted. Over the next six months, the City informed him the only way he could enclose the landing was via the IIA process and wetland buffer modification. Mr. Weinberger's preference was for the City to take the position that enclosing the landing in a manner that did not change the footprint and did not eliminate any of the buffer would not constitute improvement; the City did not accept that position and required a buffer modification. Staff informed him a collateral benefit of moving the buffer line was that his house, about half of which is a nonconforming structure and became nonconforming when the buffer was increased from 50 feet to 100 feet, would be outside the buffer and cease to be a nonconforming structure.

On June 16, 2005 Mr. Weinberger submitted the application that began the IIA process. On November 8, 2005, Mr. Weinberger amended the application, both the wetland enhancement plan and the balance of the application. Mr. Zeno provided a 2-page report outlining the changes that he prepared at that time which he noted was not contained in the materials. Ms. Watanabe entered the report as Exhibit E. Mr. Zeno noted the amended wetland study which also may not be included in the packet, was reviewed by the City's wetland consultant, The Watershed Company, who were in general satisfied with the amended study other than some minor items.

Minor changes made to conform to the recommendation of The Watershed Company led to the next amendment to the application dated December 29, 2005 and filed January 3, 2006. During the last week some further issues had been resolved via discussions. He concluded he would refer to application as it stood today and a result of the above amendments although the Staff Report's description of the application referred to older versions and issues that had been resolved.

Again referring to Section I.A.3, he identified another area of disagreement; with regard to the buffer, the applicant had only one request, to reduce the buffer via enhancement. He noted there were four benefits to the applicant from the reduction, 1) enclose the porch, 2) replace the patio in the back that existed before, 3) the rockeries become legal and 4) the structure ceases to be nonconforming. He clarified these were result of buffer reduction, not separate requests.

With regard to statement in the Staff Report that the applicant requested to move the 100-foot buffer line to 67 feet, in fact the proposed reduction was tailored to site and the applicant was not asking for a full 33 foot reduction, only at west end. He referred to Tab 1 of Exhibit D, pointing out the variable reduction.

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With regard to I.B.5, he acknowledged staff amended the Report to reflect their agreement. However, their agreement went further to include verbiage in this document and two other documents. He acknowledged there was no disagreement but the applicant requested the result of this hearing reflect that agreement. Mr. Zeno explained the larger issue was establishing a definitive set of conditions, expressing frustration with positions the Planning Department had taken over time and although the differences between staff and the applicant were disappearing, the applicant wanted to know what he would have to do to finish the process. Their proposed findings and conclusions detail what conditions remain.

Mr. Zeno advised there were two remaining unresolved issues, 1) duration of maintenance and monitoring – two years versus five years and 2) Condition 6 that required the applicant's use of the area between the original 100 foot buffer line and the new buffer line be limited to landscaping and garden. He strongly disagreed with Condition 6, explaining if the applicant was granted a reduced buffer, that area was no longer a buffer and should no longer be subject to the restrictions applied to a buffer. He referred to Tab 13 of Exhibit D, language taken from Kirkland Zoning Code regarding buffer enhancement. He pointed out the applicant's enhancement proposal exceeded the requirement. He disagreed with the logic in Condition 6, arguing there was no basis for it and it did not make sense as the loss of buffer was allowed due to the enhancement. He noted the City also told the applicant in August 2005 that a benefit of moving the buffer was the house would no longer be nonconforming; he was not told he could not use the area formerly in the buffer. He concluded this recommendation was inconsistent with City's position in other cases where the buffer line had been moved and there were no restrictions imposed on the former buffer. He referred to similar cases that were summarized in a table found in Tab 9 of Exhibit D.

With regard to what might occur in the future if the wetland expanded or the stream moved, he found it premature to impose conditions on an area removed from buffer based on speculation that the wetland would expand in future or applicant would propose some improvement in future.

Ms. Watanabe swore in Nathan Weinberger, 10530 NE 108<sup>th</sup> Street, Kirkland. Mr. Zeno provided several photos which Ms. Watanabe entered as Exhibit E (should be exhibit F). Mr. Weinberger described the photographs: page 1: the front and rear of the house when it was purchased in 1994; page 2: rockery, asphalt driveway, landscaping and chain link fence; page 3: addition under construction; page 4: front of house after addition and rockeries; page 5: beginning of City's sewer project approximately December 20, 2005 depicting a dirt pile and disturbance of buffer enhancement; page 6: manhole cover, dirt and construction work associated with sewer connection; page 7: buffer area modified during sewer construction, manhole cover and sewer line. He clarified they did not do any sewer work as part of their construction.

Mr. Weinberger described the photographs contained in Tab 3 of Exhibit D – the original front door, steps and the area he wanted to enclose from wall of house to existing supporting columns. He described a series of photographs in Tab 4, a patio at rear of house under construction in approx 1997/1998 and the completed patio project. He described photographs in Tab 5, a new retaining wall to accommodate new electrical service to the house as required by Puget Power, old retaining wall and patio removed to install utilities. He

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explained they had exceeded the timeframe for replacing the patio pavers and now would like to install wood deck which was a pervious surface. He identified the approximately 3-foot corner radius of the former patio area that was within the buffer. He described a photograph in Tab 6 of the rockery on east and identified the portion that extended into the buffer.

Mr. Weinberg advised the City suggested the buffer reduction. In discussions with staff, his landscaping consultant and him regarding whether there was any way within the Code to enclose the porch/landing, he was told the original house was legal nonconforming due to the buffer and in event of casualty where 75% of the structure were damaged/destroyed, they would need go through the IIA hearing process again, therefore, staff recommended adding the buffer reduction to their request to enclose the landing.. Mr. Zeno asked whether there was any indication by the City at that time that the buffer reduction would not be permanent; Mr. Weinberger answered no. Mr. Zeno asked whether there was any indication by the City that the use of the area removed from the buffer would be restricted. Mr. Weinberger answered no.

Mr. Zeno asked how the issue of moving buffer to convert the structure to a conforming structure arose. Mr. Weinberger advised during the discussion regarding enclosing the porch, Teresa Swan of the Kirkland Planning Department suggested reducing the buffer 33% to remove the house from the buffer so that in event of casualty, the house could be rebuilt.

City Attorney Oscar Rey asked for clarification regarding the process with Public Works, who had been their main contact and how the negotiations occurred. Mr. Weinberger answered Public Works, specifically Denise Pirolo, had requested an easement to bring the sewer line along his property. Mr. Rey asked why the City needed to install that line. Mr. Weinberger responded any other method to tie into the sewer line would be very difficult and require pumping sewage uphill; this was the most viable alternative.

Mr. Rey asked Mr. Weinberger to summarize his agreement with Public Works regarding their obtaining a temporary construct easement and a permanent sewer easement. Mr. Zeno objected on the basis of irrelevance. Mr. Rey commented there appeared to be some confusion between the negotiations between the applicant and Public Works versus the planning process. He noted Public Works had offered to assist the Weinbergers with the required enhancement. The Planning Department was acting in a regulatory capacity and there were negotiation occurring between Mr. Weinberger and Public Works. Ms. Watanabe suggested delaying further question until Public Works had had an opportunity to speak.

Ms. Watanabe swore in Denise Pirolo, Public Works. Mr. Zeno noted one of conditions recommended in the Staff Report was that the City approve the use of a portion of the right-of-way as the enhancement area. He asked whether that approval had been given and Ms. Pirolo answered it had. Mr. Zeno referred to Tab 7 of Exhibit D, an email copy of unsigned letter reflecting that approval. He submitted a signed copy of the letter provided by Ms. Pirolo which Ms. Watanabe entered it as Exhibit G.

Mr. Zeno clarified prior to obtaining the easement from Mr. Weinberger; the City did not have easement to install the sewer line extension. Ms. Pirolo agreed. Mr. Zeno noted as part of acquiring that easement, the City agreed to assume some responsibility for planting on the

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portion of his property that was within the buffer enhancement area as well as the maintenance and monitoring costs for two years. Ms. Pirolo agreed. Mr. Zeno asked why Public Works was not willing to assume maintenance and monitoring for five years. Ms. Pirolo answered two years was the agreement Mr. Weinberger and she reached. Mr. Rey objected, questioning how the question related to the buffer modification request. Mr. Zeno answered one of the recommendations was five year maintenance and monitoring; it was their position that five years was not reasonable/necessary and evidence to support that argument included Public Works' unwillingness to agree to five year maintenance/monitoring. He concluded this was relevant to reasonableness of a private party taking on that expense. Mr. Rey advised the City's willingness to be contractually obligated in the easement acquisition process was not relevant to what constituted a reasonable period in the regulatory process.

With regard to five years versus two years, Ms. Pirolo explained when staff originally approached Mr. Weinberger for the sewer easement, his hillside needed planting for his project. As staff knew there would be disturbance in the area around manhole, the City and he agreed he would grant the easement in exchange for the City doing the planting. The agreement to a two year maintenance and monitoring was reached before she knew the Planning Department would require five years. Ms. Watanabe summarized the City required five years and Public Works had agreed to two years.

Mr. Rey requested staff describe the circumstances under which the construction occurred that was depicted in the photograph of the backhoe in the buffer area on approximately December 20, 2005. Ms. Pirolo described the bore from the top of the hill through the Weinberger property to the manhole and the use of the backhoe to excavate around the manhole to tie the sewer line from the upper area to manhole. Mr. Rey asked her to describe the incident that occurred when removing the equipment from the construction area that resulted in damage to the buffer. Ms. Pirolo explained the driver was unaware the bollards on the trail were removable and drove around the bollards into the buffer area. She advised a letter was sent to the contractor informing them that the driver drove around bollards and that they may be responsible for planting/reestablishment in the buffer area. She advised this area had been planted with grass.

Ms. Watanabe swore in the applicant's wetland consultant Celeste Botha, 2025 S Norman Street, Seattle, 98104. Ms. Botha described her background as a wetland peer reviewer and wetland consultant. Mr. Zeno directed her to Tab 2, the wetland buffer enhancement plan she prepared and asked whether it meet the nine criteria in the Kirkland Zoning Code. Ms. Botha answered it did and as enhanced, the buffer would function significantly better than the currently buffer, much of which was impervious surface. Mr. Zeno referred to the comments by the City's wetland consultant, The Watershed Company and asked whether they considered her report well done and appropriate. Ms. Botha answered they had.

Ms. Watanabe asked staff to respond to two year versus five year maintenance/monitoring and the use of the buffer area. Ms. Greene referred to Section 90.55.4 of the Kirkland Zoning Code that addressed the monitoring and maintenance program applicants must submit. She summarized the City had consistently required five years and did not have the discretion to change that requirement.

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Ms. Watanabe asked whether the Planning Department had consistently taken the position to restrict use of the buffer. Ms. Greene answered this was the first time a request had been made to permanently move a buffer line. The City had consistently treated buffer modifications as modifying the buffer in a manner for a building improvement in that area. Mr. Rey added past buffer modification had been project specific. The ability to move the buffer line permanently was based on a close reading of the code and was a departure from past practices. Due to the extensive findings and conclusion proposed by applicant, he requested the City be provided time to review the information in detail and respond.

Ms. Watanabe suggested leaving the record open for parties to review new information. As this was a new interpretation, she requested further briefing from the City. Mr. Rey suggested the City's comments be provided by February 10 and Mr. Zeno's response by February 17. This was acceptable to Mr. Zeno.

In closing, Mr. Rey advised there were two outstanding issues, first the code requirement regarding the five year maintenance and monitoring. He was not aware of any provision that allowed deviation from that requirement or any other situations where a lesser maintenance and monitoring period had been granted in past. With regard to the use of the former buffer area, he explained the reason that requirement was imposed by the City was the previous practice of requiring project specific buffer modification requests. Without assurances regarding the future use of the former buffer area, it was difficult for the City to evaluate whether the nine criteria would be met.

Mr. Rey clarified it was the City's position in the event of a casualty or total loss to the property, moving the buffer line as proposed by the applicant would allow him to rebuild a substantially similar structure that had no greater intrusion into buffer than currently exists. He offered to craft a more specific condition of approval to clarify that issue.

With regard to the two years versus five year maintenance and monitoring, Mr. Zeno referred to his argument on page 8 of his conclusions. He asserted the City had imported a requirement from Section 90.55 regarding modifying wetlands into Section 90.60 regarding modification of a wetland buffer. He noted there was nothing in Section 90.60 regarding five-year maintenance and monitoring. He found numerous reasons why a five-year period was not appropriate including that the Public Works would not agree to it and that it was burdensome and expensive for a homeowner.

Mr. Zeno commented on the cost of the application and hiring consultants and attorneys to enclose a porch that did not change the footprint. He found the five year part of the monitoring an overbearing and expensive imposition that was not mandatory in code and should not be required.

With regard to the restrictions on the use of the former buffer area, he explained there were two different approaches in land use for a modification –a variance or moving a line. The Kirkland Zoning Code allows buffer reduction and enhancement justifies that by compensating for reduction. He noted the buffer reduction was justified by the enhancement of the buffer by over-compensating for the loss of the buffer. Yet in this instance, the buffer

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being reduced in exchange for the enhancement had restrictions on its use, which he found was not a modification but rather a variance. He concluded the Code did not say the reduction was temporary. He referred to the Code language which he included in Tab 13, noting the verbiage was confusing.

Mr. Zeno referred to Tab C and D, other cases in which the City had reduced the buffer and where there was no indication the modified buffer was temporary. He concluded it was not correct to say that the City had consistently taken this position in the past. In addition, staff told the applicant that a buffer reduction would solve the nonconforming issue.

Ms. Watanabe closed the hearing for today, leaving the record open for receipt of materials from staff and the applicant. She advised once she had reviewed the info, she may reopen the record for additional info. She planned to visit the site this week.

Mr. Zeno clarified the reason Public Works' activities on site arose was to explain that the disturbed area in wetland buffer was not the result of the applicant's actions. He noted the reason the rocky ends extended into buffer was result of a contractor and not a willful violation of setback.

### **ADJOURNMENT:**

Hearing no further testimony, the Hearing Examiner declared the hearing closed at 11:07 a.m.

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Jeremy McMahan, Planning Supervisor  
Department of Planning and Community Development

Recording Secretary: Jeannie Dines  
NORTHSHORE BUSINESS SERVICE